Petition

81-1129

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANCIS A. MITCHELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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QUESTIONS PRESENTED

(1) Whether defendant, whose trial did not commence until six years after his arrest, was deprived of his constitutional right to a speedy trial, where (A) Illinois failed to make any reasonable effort to secure his presence while he was incarcerated in Florida, and (B) delays occasioned by (i) defendant's motion to dismiss on grounds the State violated its discovery obligation to him, and (ii) the State's (successful) appeal from the trial court's order granting defendant's motion to suppress evidence, were attributed to defendant in the State courts' interpretation and application of Illinois statutes purportedly codifying the federal speedy trial gurantee.

(2) Whether prejudicial evidence illegally seized in violation of defendant's Fourth Amendment rights was improperly considered against him, where (i) the affidavit in support of the warrant was facially inadequate to establish probable cause, and the State reviewing court, to bolster the inadequate affidavit, improperly relied on suspicion and innuendo emanating from the fact that the officer who viewed the scene was the same officer who applied for and executed the search warrant, and (ii) the warrant failed to describe the items seized with that particularity required by the Fourth Amendment.

(3)(A) Whether the rule forbidding admission of "other crimes" evidence (subject to the "usual" exceptions) is so fundamental to a fair trial that it is an ingredient of due process of law, enforceable as such against the States; and

(B) Whether prejudicial evidence of other, subsequent crimes was improperly considered against defendant in violation of his federally guaranteed right to due process of law, where the "other crimes" evidence does not fit

within any of the acceptable exceptions to the rule forbidding the admission of such evidence generally.

(4)(A) Whether the due process standard of *Jackson* v. *Virginia*, 443 U.S. 307, applies to a State bench trial; and

(B) Whether defendant was deprived of due process under this standard, where his conviction rests entirely upon circumstantial evidence—particularly considering that prejudicial evidence illegally seized (see Question 2) and prejudicial evidence of other crimes (see Question 3) was improperly used against him.

Parties Involved[a]

Petitioner, Francis A. Mitchell, was the defendant in the trial court. As to the search issue, (Question 2 hereof), he was the appellee in the Appellate Court of Illinois, First Judicial District,[b] and petitioner in the Supreme Court of Illinois.[c] As to all other issues, he was appellant in the Appellate Court of Illinois,[d] and petitioner in the Supreme Court of Illinois.[e] Respondent, the People of the State of Illinois, was the prosecution (plaintiff) in the trial court. As to the search issue, respondent was the appellant in the Appellate Court, and respondent in the Supreme Court of Illinois. As to all other issues, respondent was appellee in the Appellate Court and respondent in the Supreme Court of Illinois.

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[a] Per Rule 21.1(b).

[b] *In the Matter of a Search Warrant, People* v. *Mitchell*, No. 77-887, 61 Ill.App.3d 99, 18 Ill. Dec. 437, 377 N.E.2d 1073 (1 Dist. 1978). (App. A).

[c] No. 50894.

[d] No. 80-776, *People* v. *Mitchell*, 95 Ill.App.3d 779, 51 Ill.Dec. 1, 420 N.E.2d 415 (1 Dist. 1981). (App. B)

[e] No. 55114. (App. C).

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1. The decision below seriously erodes the federally guaranteed constitutional right to a speedy trial, condoning a six year delay between arrest and trial (including time defendant spent in custody in another jurisdiction) and attributing to defendant, under State "speedy trial" statutory provisions,

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"delay" occasioned by (i) his motion to dismiss on grounds the State violated its discovery obligations to him and (ii) by the State's (successful) appeal from the trial court's order granting defendant's motion to suppress evidence. This Court should grant certiorari to effectuate the federal constitutional right to a speedy trial, putting an end to Illinois' improper limitation of the right via hypertechnical "tolling" techniques and disavowing the above interpretation and application of the Illinois "speedy trial" statute. 12

2. The decision below improperly dilutes the Fourth Amendment's requirements of probable cause and particular description of items to be seized. Certiorari should be granted to permit this Court to reiterate these requirements in no uncertain terms, and, specifically, to disapprove the Illinois reviewing court's reliance on the affiant officer's unstated personal knowledge as a factor contributing to a finding of probable cause 18

3. The decision below gives trial courts *carte blanche* to admit prejudicial "other crimes" evidence, thereby depriving defendants in criminal cases of a fair trial. Certiorari should be granted so that this Court may hold that the general rule excluding such evidence is an essential ingredient of due process of law, enforceable as such against the States 22

4. By affirming defendant's conviction based entirely on circumstantial evidence, the decision below seriously erodes the due process standard of *Jackson v. Virginia*, 443 U.S. 307. Certiorari should be allowed to determine whether this standard as to legal sufficiency of the evidence to overcome the

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presumption of innocence applies to a State bench trial, and to assist the States in applying this standard by discussing its applicability at bar, where all the evidence against defendant is circumstantial, the evidence does not exclude every reasonable hypothesis of guilt, and defendant contends that prejudicial evidence illegally seized (see Reason 2) and prejudicial evidence of other crimes (see Reason 3) was improperly used against him 26

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NO.

FRANCIS A. MITCHELL,

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, Francis A. Mitchell (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First District, to review its decision affirming his conviction.

Judgments and Opinions Below

The opinion of the Appellate Court of Illinois, First District, No. 77-877, reversing (on appeal by the State) the trial court's order granting defendant's motion to suppress evidence on Fourth Amendment grounds, is reported as *In the Matter of a Search Warrant, People* v. *Mitchell*, 61 Ill.App.3d 99, 18 Ill.Dec. 437, 377 N.E.2d 1073, and set out as Appendix A, per Rule 21.1(k)(i). The Supreme Court of Illinois denied leave to appeal, No. 50894, 71 Ill.2d 612.

The opinion of the Appellate Court of Illinois, First Judicial District, affirming defendant's conviction, No. 80-776, is published at 95 Ill.App.3d 779, 51 Ill.Dec. 1, 420 N.E.2d 415 (1 Dist. 1981). (App. C) The order of the Supreme Court of Illinois denying petition for leave to appeal, No. 55114, October 19, 1981, is unpublished.

Jurisdictional Statement

On March 3, 1981, the Appellate Court of Illinois, First Judicial District, delivered its opinion affirming defendant's conviction and sentence. (App. B) His timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 19, 1981. (App. C) This petition to review the judgment of a state court of last resort in a criminal case is timely filed within 60 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and Rule 20.1.

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

"Section 1 . . . [N]or shall any State deprive any person . . . of liberty . . . , without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Chap. 38, sec. 9-1, Ill. Rev. Stat. 1973, provides:

"(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another;

(3) He is attempting or committing a forcible felony other than voluntary manslaughter."

Chap. 38, sec. 103-5, Ill. Rev. Stat. 1979, provides in part:

(a) "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant . . . or by an interlocutory appeal."

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act, by a competency hearing, by an adjudication of incompetency for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

(c) If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.

(d) Every person not tried in accordance with subsections (a), (b) and (c) of this Section shall be discharged from custody or released from the obligations of his bail or recognizance.

(e) * * * [Inapplicable]

(f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subparagraphs (a), (b), or (c) of this Section and on the day of expiration of the delay the said period shall continue a tthe point at which it was suspended . . . "

Chap. 38, sec. 1003-8-9, art. III(a) (Uniform Agreement on Detainers), provides:

"Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for a good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner."

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged with the murder of his ex-mother-in-law, Frances Krejci. (superseding indictment No. 75-852, R. 813b[1].) On the State's appeal from the trial court's order granting defendant's motion to suppress evidence, the Appellate Court of Illinois, First Judicial District, reversed and remanded for trial. (App. A) After the Illinois Supreme Court denied leave to appeal, defendant waived jury trial and was found guilty of murder by the court. (R. 303, 931, 746) He was sentenced to 35 to 75 years imprisonment. (R. 782)

On appeal, the Appellate Court of Illinois, First Judicial District, affirmed the conviction, (App. C), and denied rehearing, (App. B); the Supreme Court of Illinois denied petition for leave to appeal. (App. C)

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[1] References to "R.", without designation of case number, are to the Record (including Transcript of Proceedings, consecutively paginated within the Record) in No. 80-776. References to the State's appeal on the Fourth Amendment issue are specifically designated as "R.____ in No. 77-887."

STATEMENT OF FACTS

To the extent that the Appellate Court's opinions (Apps. A & B) contain material meeting the requirements of Rule 21.1(g), such is here incorporated by reference to avoid unnecessary duplication. The specific facts pertaining to the Questions Presented are:

Facts re Deprivation of Right to Speedy Trial

The facts concerning this issue are of such complexity that they must be stated in considerable detail. For convenience, this portion of the *Statement of Facts* is set out as App. D.

Facts re Violation of Fourth Amendment

The complaint (affidavit) for warrant (Ex. A, R. 41-42 in No. 77-887, to defendant's Motion to Quash and Suppress, R. 39 in No. 77-887), reads as follows:

> "Officer Michael Ochsner, complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search the person of ..... and 465 South Oak Glenn Drive, Bartlett, Illinois, and seize the following instruments, articles and things: any clothing, weapons, instruments, articles, or contraband which have been used in the commission of, or which constitute evidence of the offense of Murder.
>
> Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above: [Note: the following is a verbatim copy of the typewritten body of the complaint, over Ochsner's signature.]
>
> On June 9, 1973, at approximately 11:22 A.M., the Berwyn Police Dept. was contacted by Mildred Mitchell

of Bonita Springs, Florida and asked to investigate the welfare and condition of her mother, Frances Krejci, of 3622 South Cuyler, Berwyn, Illinois. Mildred Mitchell stated that *her and her father** had been brutally assaulted this morning by Mrs. Mitchell's ex-husband, Frank Anthony Mitchell. I, Officer Michael Ochsner, was assigned to investigate this call. Upon arrival at 3622 South Cuyler, Berwyn, Illinois, I was met by Lillian Beranek, a friend of Mrs. Krejci, who stated that *she was expected for lunch*** but was unable to obtain a response [unintelligible in our copy; from?] Mrs. Krejci. Two neighbors at the [end of R. 41] scene also confirmed that Mrs. Krejci had not been seen since Thursday evening, June 7, 1973, and that their attempts to arouse her were unsuccess- [end of line; see R. 42, second and third lines of typed material] this point, I and Sgt Ahr made a forceable [*sic*] entry of the premises with the assistance of the Berwyn Fire Dept. Upon entry, I discovered the victim, Francis Krejci, lying at the bottom of a starcase [*sic.*] In the hallway. *She had severe head wounds. No weapon was found* at or near the scene of the crime. Frances Krejci was pronounced dead at 12:24 pm, June 9, 1973, by Dr. Santiago of the McNeal Memorial Hospital Staff. At this time, Mildred Mitchell telephoned the premises and was appraised [*sic.*] of the condition of her mother. Miss Mitchell stated, 'You gotta get my ex-husband, Frank Mitchell.' Miss Mitchell further related that Frank Mitchell had attacked her and her father with a hammer in her home in Bonita Springs, Florida at apprx. 415 am on this date (June 9, 1973). She further stated that she telephoned Frank Mitchell at his home in Bartlett, Illinois at 11:30 (unintelligible; appears to be "am") this date (June 9, 1973) and found him to be home.

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* "her and her father"—could refer to the caller as "her," or to the caller's mother; syntax unclear.

** Who was expected to lunch with whom?

> She then provided us with the address of Frank Mitchell (465 South Oak Glenn Drive, Bartlett, Illinois.) *Based upon the facts* as set out in this complaint *and the strong similarity of* THIS CRIME *and the crimes in Florida, I believe a search of these premises will reveal evidence of* THIS CRIME." (Emphases and footnotes added.)

In its opinion reversing the trial court's order suppressing this evidence, the Appellate Court stated, *inter alia*:

> "It is significant to note that the officer who investigated the welfare of the victim and observed the crime scene is the same individual who secured and executed the warrant." App. A, p. App. 5, 377 N.E.2d at 440.

Facts re "Other Crimes" Evidence

After the trial court denied defendant's motion *in limine* to exclude all evidence of events which occurred in Florida, (R. 58, 112, 119, 545; see R. 897-901), testimony of Mildred Mitchell, defendant's ex-wife (and daughter of the deceased) (R. 562-75) concerning defendant's alleged battery upon her and her father in Florida, as well as supposedly corroborative testimony thereof from Mildred's Florida neighbors, Marion Losch (R. 588-95) and her husband, John (R. 595-600), was admitted and considered by the trial court. (See App. B, pp. Rpp. 22-23)

Facts re Insufficiency of the Evidence

The basic, underlying facts of the prosecution's case, upon which the trial court and the State reviewing court found that the prosecution had proven defendant guilty beyond a reasonable doubt, are set out in App. B, pp. App. 8-13. Additional details necessary fo ran understanding of defendant's argument that the evidence is legally insufficient to sustain conviction are set out *infra*, pp. 27-28.

Raising the Federal Questions Below

Speedy Trial[2]

On April 9, 1976, defendant moved to dismiss for the State's failure to try him in accordance with the State statutory codification of right to a speedy trial [Ill. Rev. Stat., chap. 38, sec. 103-5(a), set out at p. 3, *supra*]. (R. 815) Holding that his reindictment in 1975 vacated all previous time defendant had spent in custody, the trial court denied the motion to dismiss. (R. 28; see also R. 6, 8-9, 21, 25)

On January 5, 1977, defendant moved to dismiss due to the State's failure to provide the defense with any discovery materials for a year and a half. (R. 35, 844) At the hearing on this motion, defense counsel represented that the previous defense motions for continuance were necessitated by the State's failure to comply with its discovery obligations. (R. 49) The trial court denied the motion on June 7, 1979. (R. 302)

Defendant's motion to suppress evidence seized under a search warrant, made on January 5, 1977 (R. 842-43), was granted one week later on January 12, 1977. (R. 876, et seq.) The State appealed on January 17, 1977 (R. 877), and the Appellate Court reversed on May 31, 1978. (App. A)

On January 23, 1979, defendant renewed his motion to dismiss due to the State's failure to comply with discovery. (R. 116)

On February 14, 1979, defendant filed an additional petition for discharge on speedy trial grounds, (R. 902-04); at the hearing thereon, February 26, 1979, defendant sought

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[2] See also App. D, containing additional facts concerning denial of defendant's constitutional right to a speedy trial.

an evidentiary hearing concerning the 1973 grand jury proceedings which had resulted in a "no bill," in an effort to establish that the State had intentionally withheld information from that grand jury in order to be able to subsequently use evidence adduced in connection with defendant's Florida conviction. (R. 201-02; 207-08) On March 1, 1979, the trial court denied an evidentiary hearing in this regard, (R. 249), and denied the motion for discharge. (R. 253-54)

Defendant had demanded trial while in Florida custody (R. 21, 921-22), and again on October 7, 1976 (R. 791), and still again on January 12, 1977 (R. 876kk), when the trial court granted the motion to suppress. After the mandate issued (as to the Appellate Court's reversal of the suppression order), defendant continued to demand trial. (R. 793)

Defendant presented his denial of speedy trial claim to the Appellate Court, which affirmed, (App. B, pp. App. 19-21), and to the Supreme Court of Illinois, which denied leave to appeal. (App. C)

Fourth Amendment

Defendant moved to quash the warrant and suppress all evidence seized thereunder, (R. 39 to 77-887), on grounds the warrant was facially insufficient to establish probable cause as required by the Fourth Amendment and, further, that it failed to describe the items to be seized with sufficient particularity as required by the Fourth Amendment. The trial court granted the motion. (R. 876) On appeal by the State, defendant-appellee pressed his Fourth Amendment grounds, and the Appellate Court reversed and remanded. (App. A) Defendant presented the Fourth Amendment claim to the Supreme Court of Illinois via

petition for leave to appeal, which that court denied. The Fourth Amendment point was again presented by defendant in the instant appeal from his conviction, (see App. B, p. App. 24), and the Appellate Court affirmed, [curiously] holding that its prior decision (reversing the order granting the motion to suppress on appeal by the State; see App. A) was *res judicata* as to this issue. (App. B, p. App. 24)

"Other Crimes" Evidence

Defendant's motion *in limine* to exclude all evidence of events which occurred in Florida was denied by the trial court. (R. 58, 112, 119, 545; see R. 897-901.) Defendant argued on appeal that the trial court's consideration of this evidence [consisting of testimony of Mildred Mitchell, defendant's ex-wife and daughter of the deceased, concerning defendant's alleged battery upon her and her father in Florida, (R. 562-75), and the supposedly corroborative testimony of Mildred's Florida neighbors, Marion Losch, (R. 588-95), and her husband, John, (R. 595-600)] was prejudicial and deprived him of a fair trial, (see App. B, p. App. 22-23), and the Appellate Court affirmed. (App. B, pp. App. 22-23)

Insufficiency of the Evidence

Defendant moved for acquittal at the close of the prosecution's case and at the close of all the evidence, arguing, *inter alia,* that the circumstantial evidence was insufficient to prove him guilty of murder beyond a reasonable doubt. (See App. B, pp. App. 21-22) He again presented this claim to the Appellate Court, which affirmed. (App. B, pp. App. 21-22)

REASONS FOR GRANTING THE WRIT

1. **The decision below seriously erodes the federally guaranteed constitutional right to a speedy trial, condoning a six year delay between arrest and trial (including time defendant spent in custody in another jurisdiction) and attributing to defendant, under State "speedy trial" statutory provisions, "delay" occasioned by (i) his motion to dismiss on grounds the State violated its discovery obligations to him and (ii) by the State's (successful) appeal from the trial court's order granting defendant's motion to suppress evidence. This Court should grant certiorari to effectuate the federal constitutional right to a speedy trial, putting an end to Illinois' improper limitation of the right via hypertechnical "tolling" techniques and disavowing the above interpretation and application of the Illinois "speedy trial" statute.**

The Sixth Amendment right to a speedy trial, "one of the most basic rights preserved by our Constitution," *Klopfer* v. *North Carolina*, 386 U.S. 213, 226, 18 L.Ed.2d 1, 9 (1967),[3] is enforceable against the States as an essential ingredient of due process of law. *Id.* at 222-26, 18 L.Ed.2d at 7-9.

The Illinois courts' interpretation and application to defendant's case of Illinois statutory provisions which pur-

[3] In *Klopfer*, wherein this Court first held the right to a speedy trial applicable to the States, the history of the right is traced back to recognition in the Assize of Clarendon (1166), *id.* at 223, 18 L.Ed.2d at 8, even before its "first articulation in modern jurisprudence" in the Magna Carta in 1215. *Ibid.* For a thorough and fascinating history of the right to a speedy trial, see *id.* at 223-26, 18 L.Ed.2d at 8-9. See also *Petition of Provoo*, 17 F.R.D. 183, 196-97 (D. Md. 1955).

portedly codify the right to a speedy trial,[4] (see App. B, pp. 13-19, and App. D), result in a clear deprivation of defendant's federally guaranteed constitutional right to a speedy trial.

* * *

Three distinct interests protected by the speedy trial provision are: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker* v. *Wingo*, 407 U.S. 514, 532, 33 L.Ed.2d 101, 118 (1972). In that case, Your Honors established a four-pronged test for determining whether a delay in bringing a case to trial requires reversal, involving a functional analysis of the speedy trial right in terms of the following factors: (a) the length of the delay, (b) the reasons for the delay, (c) the defendant's assertion of his right, and (d) the prejudice to the defendant. *Id.* at 530, 33 L.Ed.2d at 117.

In applying the four-pronged *Barker* v. *Wingo* test, this Court specifically has stated that no single factor is necessary or determinative. *Id.* at 533, 33 L.Ed.2d at 118.

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[4] While we rely on the federal constitutional guarantee of speedy trial rather than on the Illinois statutory provisions which allegedly implement it, the State courts' nit-picking application of the statutes (see App. B, pp. App. 13-19) must carefully be scrutinized, for as applied they operate to deprive defendant of a speedy trial.

To the extent the Illinois Speedy Trial Act (chap. 38, sec. 103-5) (see pp. 3-4, *supra*) applies only to defendants incarcerated in Illinois, while the Uniform Agreement on Detainers (chap. 38, sec. 1003-8-9) (see pp. 4-5, *supra*), with its longer time provisions, applies to defendants incarcerated in other jurisdictions and charged with Illinois offenses, this discrepancy violates the equal protection clause of the Fourteenth Amendment. See *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L.Ed.2d 600 (1969); *cf. Toomer* v. *Witsell*, 344 U.S. 395, 92 L.Ed. 1460 (1947).

Most significantly, in *Moore* v. *Arizona*, 414 U.S. 252, 38 L.Ed.2d 183 (1973), Your Honors held there is no requirement that prejudice affirmatively be demonstrated, reversing where a reviewing court had erroneously imposed such requirement. (*Cf.* App. B, p. App. 20.)

* * *

(a) Length of Delay. In the case at bar, the six year lapse of time between arrest and trial, characterized by the Appellate Court as "unfortunate," (App. B, p. App. 21), is both inordinate and unjustified. See *Prince* v. *State of Alabama*, 507 F.2d 693, 701-02 (5 Cir. 1975).

(b) Reasons for Delay. Here, the reasons for the delay—chiefly, defendant's incarceration in Florida, his eventual reindictment by the State, his inability to prepare his defense because the State failed to comply with discovery requirements, and the State's appeal from the order granting his motion to suppress—are, on balance, not properly chargeable to the defendant so as to condone the delay.

The State has a constitutionally imposed duty to take affirmative steps to secure a defendant's return for trial if he is in custody in another jurisdiction. *Smith* v. *Hooey*, 393 U.S. 374, 21 L.Ed.2d 607 (1969); *Dickey* v. *Florida*, 398 U.S. 30, 26 L.Ed.2d 26 (1970); *Smith* v. *Cox*, 474 F.2d 563 (4 Cir. 1973); *United States* v. *McConahy*, 505 F.2d 770 (7 Cir. 1974); *Prince* v. *State of Alabama, supra*, at 704-05. The State's conduct here with respect to defendant (see App. B, p. App. 16 & App. D, pp. App. 25-27) fails to comport with this constitutional requirement.

The period of time during which defendant was not under indictment on the Illinois charge, after the No Bill was returned and the first indictment was *nolle prossed* and before the superseding indictment was returned, (see App. D, p. App. 26), does not significantly affect the func-

tional analysis; for the State chose to wait 10 months *after* defendant was convicted on the Florida offense before proceeding to reindictment, although the prosecution was well aware of defendant's custodial whereabouts. (See App. D, p. App. 26) The prosecutorial tactics involved require that this delay not be attributed to defendant, particularly since he demanded to be returned to Illinois from Florida as soon as the Illinois proceedings had been reactivated. (App. D, p. App. 26) See *United States* v. *Lara*, 520 F.2d 460 (D.C. Cir. 1975), where defendant originally was indicted in the District of Columbia; the government dismissed the indictment and reindicted him in Florida. Finding that this decision was "dictated by tactics and not by necessity," the reviewing court charged the government with the delay, and, finding a violation of defendant's right to a speedy trial, reversed his conviction.[5]

That the defendant here moved to dismiss and agreed to certain continuances because he could not prepare for trial absent the State's compliance with discovery must not be turned against him under the circumstances. (See App. B, p. App. 18.) The State's failure to provide the discovery necessary for defendant to prepare a defense continued for approximately a year and a half. (App. D, pp. App. 27-29)[6]

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[5] Here, defendant attempted to establish the prosecutor's motives in originally obtaining the "no bill" in 1973 by moving for an evidentiary hearing in this regard for purposes of calling the foreman of the 1973 grand jury. (R. 207-08) The trial court denied the motion and refused to hold an evidentiary hearing. (R. 249) (See App. D, pp. 28-29.) Denial of the motion for discharge without a meaningful evidentiary hearing on this issue was improper. *Cf. Haines* v. *Kerner*, 404 U.S. 519, 30 L.Ed.2d 652 (1972).

[6] While information as to the time of decedent's death was crucial to defendant's proposed alibi defense, he was not furnished with any information from the State as to the time of her death as late as March 15 and April 18 of 1979. (R. 269, 290; see App. D, p. App. 29.)

Similarly, the time spent in disposing of defendant's motion to suppress evidence—including the time consumed by the State's appeal—should not be attributed to defendant for purposes of defeating his speedy trial claim.[7] See *United States* v. *West*, 504 F.2d 253 (D.C. Cir. 1974), reversing on speedy trial grounds for a 13-month delay, including a period of 5 months between defendant's filing of a motion to suppress and the court's order denying it. In *United States* v. *Cox*, 475 F.2d 837, 841 (9 Cir. 1973), defendant had successfully moved to suppress. During pendency of the government's appeal, the trial court granted defendant's motion to dismiss for denial of a speedy trial, and the Court of Appeals affirmed. *Cf. United States* v. *Calloway*, 505 F.2d 311 (D.C. Cir. 1974), reversing for a 15-month delay, although 3 months thereof were consumed by mental examinations on motion of the defendant.

Indeed, the Appellate Court's determination that time consumed by defendant's motion to dismiss for the State's failure to provide him with discovery necessary in the preparation of his defense and by his motion to suppress on Fourth Amendment grounds effectively interrupted the time-period to be considered in determining whether his right to a speedy trial had been denied, (see App. B, p. App. 17-18 & App. D, pp. App. 27-29), runs directly afoul of the principle expressed by this Court in another context in *Simmons* v. *United States*, 390 U.S. 377, 394, 19 L.Ed.2d 1247, 1259 (1968), that "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another." For in effect, what the State reviewing court's holding means is that in exercising (or attempting to exercise) his constitutional rights to present a defense and to Fourth Amendment protection, defendant is deemed to have surrendered his constitutional right to a speedy trial. This is unconscionable. The interpretation of the

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[7] Defendant's motion to suppress was granted one week after it was filed. (App. D, p. App. 27.)

Illinois statutory provisions which results in this fiasco (see App. B, pp. App. 13-19) must not be tolerated by this Court.

(c) Defendant's Assertion of Right. Defendant consistently asserted his right to a speedy trial. (App. D, pp. App. 25-29; see pp. 9-10, *supra.*) The Appellate Court's characterization o fhis action as "rilatory," (App. B, p. App. 21), does not comport with the facts, considering the foregoing discussion.

(d) Prejudice. As to the prejudice factor, this Court has recognized that "prejudice" need not be confined to impairment of the ability to defend.[8]

During the pendency of the charge here, defendant lost his long-time profession as a draftsman and teacher. (R. 982)

Moreover, defendant's ex-father-in-law, Anton Krejci, died about 4 years after defendant's arrest (R. 575), thus making it impossible for defendant to call him as a witness to rebut the testimony as to defendant's alleged attack on him. (See Point 3, *infra.*)[9]

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[8] "He might be subjected to public scorn, *deprived of employment*, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes." *Barker* v. *Wingo*, *supra*, 407 U.S. at 532 n.33, 33 L.Ed.2d at 118 n.33, citing *Klopfer* v. *North Carolina*, *supra*, 386 U.S. at 221-22, 18 L.Ed.2d at 6-7. (Emphasis added.)

See *United States* v. *Dreyer*, 533 F.2d 112 (3 Cir. 1976), where the reviewing court, finding prejudice to the defendant via the psychological pressures of delay, ordered the indictment dismissed.

[9] The Florida battery conviction was based solely on defendant's guilty plea to an attack on his ex-wife, and there had been no conviction concerning Mr. Krejci. His testimony could have benefitted the defense.

See also *Moore* v. *Arizona*, 414 U.S. 252, 38 L.Ed.2d 183 (1973), discussed at p. 14, *supra.*

Certiorari should be granted to effectuate the federal constitutional right to a speedy trial. The decision below seriously erodes that right via the Illinois courts' hypertechnical "tolling" techniques in the application and interpretation of State statutory provisions purportedly designed to implement it. On the merits, this Court should determine that under the circumstances of this case, the six year delay between defendant's arrest[10] and his trial violated his federally guaranteed constitutional right to a speedy trial. Accordingly, his conviction should be reversed with appropriate directions.

2. The decision below improperly dilutes the Fourth Amendment's requirements of probable cause and particular description of items to be seized. Certiorari should be granted to permit this Court to reiterate these requirements in no uncertain terms, and, specifically, to disapprove the Illinois reviewing court's reliance on the affiant officer's unstated personal knowledge as a factor contributing to a finding of probable cause.

The complaint for warrant (set out at pp. 6-8, *supra*) fails to establish probable cause to believe (i) that an offense was committed, (ii) that defendant committed any offense, and (iii) that evidence of a crime would be found in his home.

All the facts alleged are as consistent with accidental death as with death by any non-accidental means; for under the facts as alleged in the complaint, Mrs. Krejci

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[10] Arrest itself triggers the constitutional speedy trial provision; a defendant need not await indictment, information or other formal charge to invoke it. *Dillingham* v. *United States*, 423 U.S. 64, 46 L.Ed.2d 205 (1975). The Appellate Court refuses to acknowledge this. (See App. B, p. App. 20.)

could have died as a result of accidental injuries incurred in a bad fall down the stairs.[11] From the facts contained therein, accidental death is as reasonable a hypothesis as is the theory that anyone, let alone defendant, may have wreaked any violence upon her.

Absent anything else within the four corners of the complaint for warrant characterizing the nature of the wounds, that they were "severe" and of the "head" does not render them similar to those involved in any offense, and, more particularly, does not justify designating whatever happened to the deceased as bearing "strong similarity" to the alleged "crimes" in Florida.

No facts alleged were sufficient even to intimate that what befell the unfortunate decedent was a crime.

* * *

The "facts" alleged failed to constitute probable cause, framed as they were in terms of a single officer's mere belief, founded strictly on faith (good though it may have been) rather than on facts. Stating that this belief was based upon "facts" and "similarity" cannot buttress the pure faith nature of the belief.

While preference is to be accorded warrants, *Jones* v. *United States*, 362 U.S. 257, 4 L.Ed.2d 697 (1960), the mere fact that allegations are contained in writing in a warrant cannot save an insufficient complaint as at bar. In *Spinelli* v. *United States*, 393 U.S. 410, 419, 21 L.Ed.2d 584, 645-46 (1969), this Court, responding to the argument concerning the preference to be accorded warrants, refused to permit this principle to be used as a crutch to uphold an insufficient warrant, holding:

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[11] "Upon entry, I discovered the victim, Frances Krejci, lying at the bottom of a starcase [*sic.*] in the hallway. She had severe head wounds." Complaint for warrant, set out at p. 7, *supra;* see also App. A, pp. App. 2-3.

> "[W]e cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

The worst vice of the Illinois Appellate Court's opinion reversing the trial court's order granting defendant's motion to dismiss (App. A) is the court's reliance on unstated personal knowledge hidden within the brain of the affiant officer:

> "It is significant to note that the officer who investigated the welfare of the victim and observed the crime scene is the same individual who secured and executed the warrant." (App. A, p. App. 5)

The constitutional requirement that "no Warrants shall issue, but upon probable cause," is emasculated by this reasoning, for it makes every citizen's security in his home dependent on the happenstance of whether the officer who investigated the occurrence is also the same one who applied for and executed the warrant. A warrant, together with the complaint on which it was issued, must stand or fall on its face, without regard to the identity of the affiant officer. Upholding the instant warrant on the basis of the officer's identity is patently dangerous to our organized system of ordered liberty under law. The reviewing court's opinion has perpetrated a most grievous error of constitutional magnitude with respect to the sanctity of a person's dwelling[12] as codified in the Fourth Amendment.

* * *

Alternatively, the items to be seized were so generally described in the complaint and warrant as to violate the

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[12] "For a man's house is his castle, *et domus sua cuique tutissimum refugium*." Sir Edward Coke (1552-1634), *Third Institute*, in BARTLETT'S FAMILIAR QUOTATIONS 172:2 (15th ed. 1980).

Fourth Amendment's basic mandate of specificity.[13] Under the description therein contained, a forbidden "fishing expedition" search was authorized and, indeed, took place. The warrant so generally described the items to be seized that the executing officers had *carte blanche* to take the kitchen along with the sink.[14]

So-called "generic" descriptions of types of items to be seized, as at bar, are constitutionally insufficient, and the complaint and warrant containing such over-broad descriptive verbiage resulted in violation of defendant's Fourth Amendment rights. See, *e.g.*, *United States* v. *Marti*, 421 F.2d 1263, 1266-69 (2 Cir. 1970) (obscenity case, reversing convictions); *United States* v. *McSurely*, 473 F.2d 1178, 1187-90 (D.C. Cir. 1972) (seditious matter and related instrumentalities; convictions reversed); *United States* v. *Gardner*, 537 F.2d 861 (6 Cir. 1976) (affirming district court's order suppressing sawed-off shotgun pursuant to warrant issued by State court judge on grounds of over-broad description); *United States* v. *Klein*, 565 F.2d 183

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[13] ". . . particularly describing the . . . things to be seized." The specificity requirement, as expressed in *Marron* v. *United States*, 275 U.S. 192, 72 L.Ed. 231 (1927), reflects Colonial America's aversion to writs of assistance and general warrants which placed broad discretionary authority with British customs officials to search anywhere for smuggled goods and seize anything they pleased. See *Weeks* v. *United States* 232 U.S. 383, 389-91, 58 L.Ed 652 (1974); *Boyd* v. *United States*, 116 U.S. 616, 623-35, 29 L.Ed. 746 (1886). See also *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-29, 6 L.Ed.2d 1127 (1961).

[14] ". . . seize the following instruments, articles and things: any clothing, weapons, instruments, articles, or contraband which may have been used in the commission of, or which constitute evidence of the offense of Murder." (App. A, pp. App. 1-2; see p. 6, *supra*.)

Here, they seized: a 1973 Ford automobile, a desk calendar and a bag of clothing; hardly items specifically described and seized without use of "broad" discretion by the officer.

(1 Cir. 1977) (affirming order suppressing evidence; "pirate" tapes in violation of copyright laws).

* * *

Certiorari should be granted so that this Court may reiterate the Fourth Amendment's requirements of probable cause and particular description of items to be seized, as it is clear from the instant decision below that the Illinois reviewing courts are improperly diluting these requirements. More precisely, the court's reliance on the affiant officer's unstated personal knowledge as a factor contributing to a finding of probable cause should be disapproved. On the merits, the Court should find the warrant facially insufficient and thus reverse the Appellate Court's decision, affirming the trial courts' order suppressing the evidence seized thereunder, with appropriate directions.

3. The decision below gives trial courts carte blanche to admit prejudicial "other crimes" evidence, thereby depriving defendants in criminal cases of a fair trial. Certiorari should be granted so that this Court may hold that the general rule excluding such evidence is an essential ingredient of due process of law, enforceable as such against the States.

Prejudicial "other crimes" evidence, concerning defendant's alleged battery upon his ex-wife and ex-father-in-law in Florida subsequent to the death of the decedent, improperly was considered by the trial court against defendant. (See p. 8, *supra*.) The Appellate Court approved admission of this evidence on the theory that the Florida crimes demonstrated "*modus operandi*" and thus that evidence thereof was admissible as an exception to the general rule prohibiting admission of evidence of uncharged offenses. (App. B, pp. App. 22-23)

The rationale for the general rule excluding such evidence has been stated by this Court as follows:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant, on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson* v. *United States,* 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-74 (1948).[15]

Acknowledging that evidence of subsequent (as opposed to prior) criminal acts is prohibited to prove identity of the offender, the reviewing court nonetheless deems such evidence admissible here on the theory that it establishes "*modus operandi.*" (App. B, p. App. 23) But this is a distinction without a difference, because the very gist of *modus operandi* evidence is to establish that two or more crimes were perpetrated by a single offender (*i.e.*, identity) by virtue of distinctive features inherent in the commission of the offenses.

Federal decisional law supports defendant's position that, in any event, the Florida evidence was not demonstrative of any unique characteristics worthy of being designated a so-called "signature" of the offender whereby he

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[15] The exceptions to the general rule are conceded to be as stated in the Appellate Court's opinion, App. B, p. App. 22, to wit, that otherwise inadmissible evidence of other crimes may be considered to prove motive, intent, absence of mistake, or *modus operandi*. See *United States* v. *Fierson*, 419 F.2d 1020 (7 Cir. 1969) (reversing); *cf.* F.R.E. 404(b).

However, we dispute that either *modus operandi* or identity is a proper purpose for allowing evidence of subsequent, as opposed to prior, other crimes.

can be identified for application of the "*modus operandi*" exception. Moreover, there was insufficient showing of similarity between the Florida offenses and the circumstances surrounding the death of the decedent to bring that exception into play. Each of the following decisions reverses a conviction where the fact-finder was permitted to consider prejudicial evidence of another offense under the improper label of "*modus operandi*" evidence: *United States* v. *Silva*, 580 F.2d 43, 48 (9 Cir. 1979) (evidence of subsequent drug sale improperly admitted because not a "signature" offense; no showing that it bore "such a high degree of similarity as to mark it as the handiwork of the accused."); *United States* v. *Myers*, 550 F.2d 1036, 1044-48 (5 Cir. 1977); *United States* v. *Connor*, 580 F.2d 38, 40-43 (2 Cir. 1978); *United States* v. *Herman*, 589 F.2d 1191, 1198 (3 Cir. 1978); *United States* v. *Park*, 525 F.2d 1279, 1284 (5 Cir. 1976).

* * *

This Court has not yet elevated the rule requiring exclusion of prejudicial "other crimes" evidence to one of constitutional magnitude enforceable against the States. The instant case is an appropriate vehicle for such a decision, which appears necessary in the face of State appellate decisions such as that here at issue. After all,

> "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes." *United States* v. *Myers*, *supra*, at 1044.

Besides the *Michelson* decision, *supra*, other cases from this Court dictating such a result include *Marshall* v. *United States*, 360 U.S. 310, 3 L.Ed.2d 1250 (1959), and *Boyd* v. *United States*, 142 U.S. 450, 35 L.Ed. 1077 (1892).

* * *

With defendant's liberty at stake, it is no answer to speculate that perhaps the court, sitting as fact-finder, did not consider the prejudicial matter.[16] Even judges can be affected subliminally:

> "The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious." *United States* v. *Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972).

* * *

Certiorari should be allowed so that this Court may hold, as a matter of first impression, that the general rule forbidding admission of "other crimes" evidence is an essential ingredient of due process of law, enforceable as such against the States. Further, the so-called "*modus operandi*" exception to the exclusionary rule should be clarified, as it appears no decisions of this Court specifically have treated this issue of general importance to the administration of criminal justice.

On the merits, because the trial court was exposed to, and apparently considered, improper and prejudicial evidence as to other crimes committed by defendant subsequent to the crime charged, upon the improper theory that such evidence was admissible as proof of "*modus oper-*

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[16] While no federal case precisely so holding was found, consider *People* v. *Nuccio*, 48 Ill.2d 375, 253 N.E.2d 353 (1969). There, the Illinois Supreme Court reversed defendant's murder conviction *following a bench trial*, despite the usual rule that a court in a bench trial is presumed to have considered only competent and proper evidence in reaching its decision, where prejudicial material was communicated to the court through insinuations during cross-examination and never substantiated, and the court—as at bar—never acknowledged the impropriety of the prejudicial material. Here, as in *Nuccio*, "there is no indication of the court's awareness of this impropriety even though it is brought to his attention . . ." *Id.* at 364.

andi," defendant was deprived of that fair trial to which he is constitutionally entitled, and his conviction should be reversed with appropriate directions.

4. By affirming defendant's conviction based entirely on circumstantial evidence, the decision below seriously erodes the due process standard of Jackson v. Virginia, 443 U.S. 307. Certiorari should be allowed to determine whether this standard as to legal sufficiency of the evidence to overcome the presumption of innocence applies to a State bench trial, and to assist the States in applying this standard by discussing its applicability at bar, where all the evidence against defendant is circumstantial, the evidence does not exclude every reasonable hyothesis of guilt, and defendant contends that prejudicial evidence illegally seized (see Reason 2) and prejudicial evidence of other crimes (see Reason 3) was improperly used against him.

Under the due process standard recently enunciated by Your Honors in *Jackson* v. *Virginia*, 443 U.S. 307, 61 L.Ed 2d 560 (1979), incorporating principles expressed in *In Re Winship*, 397 U.S. 358, 361-64, 25 L.Ed. 2d 368, 373-75 (1970), a conviction cannot stand if, taking the evidence most favorably to the prosecution, no reasonable jury could have found defendant guilty as to each element of the offense. *Id.* at 324, 61 L.Ed.2d at 576-77. While (apparently) this Court has not yet had occasion to decide whether such standard also applies in a State bench trial, at least one United States Court of Appeals has extended it to a federal bench trial. In *United States* v. *Tranowski*, 659 F.2d 750, 757 (7 Cir. 1981), the court, having ruled that certain opinion evidence had been improperly admitted, determined that the remaining, competent evidence was insufficient under the *Jackson* standard and reversed, stating:

> "Having rejected the expert's testimony, the critical inquiry remains whether the [other] testimony . . . is sufficient to support a conviction beyond a reasonable doubt. Upon this evidence we do not believe that 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [citing *Jackson, supra*] . . . 'Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard.' *Brinegar* v. *United States*, 336 U.S. 160, 174 . . . (1949); *In Re Winship* . . . [*supra*]." *Tranowski, ibid.*

The evidentiary facts comprising the prosecution's case at bar are wholly circumstantial, as was even acknowledged by the reviewing court. (App. B, p. App. 21) Although various reasonable theories compatible with defendant's innocence were argued at trial and on appeal,[17] the court arbitrarily—perhaps because of the prejudicial and incompetent evidence already admitted (see Reasons 2 & 3,

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[17] While defendant's notebook contained incriminating notes to himself, (in "indented writing"; see App. B, pp. App. 12-13), there is evidence he did not carry out all the plans and details therein, thus casting doubt that he carried out those which the prosecution wished the court to believe he did.

No fingerprints were recovered; there was no sign of forced entry. (R. 433) Because of evidence that decedent would not have allowed defendant into her home, (App. B, p. App. 10), and the absence of any evidence that defendant had a key, this evidence is compatible with defendant's hypothesis of innocence.

While blood stains found in defendant's car were of the type the decedent had, Mildred Mitchell had the same blood type, and the stains (as well as evidence that defendant's hands were injured) were equally explainable on the theory that this evidence was related to defendant's (admitted) battery on his wife in Florida. (See App. B, pp. App. 9 & 11.)

supra)—determined that defendant's guilt had properly been established.

Proof of a defendant's guilt may not be furnished by mere speculation or conjecture. In *United States* v. *Diggs*, 527 F.2d 509, 513 (8 Cir. 1975), the court, reversing, said:

> "While the facts proved by the government were certainly suspicious, a jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture."

* * *

Certiorari should be allowed to determine whether the *Jackson* v. *Virginia* standard as to legal sufficiency of the evidence to overcome a defendant's presumption of innocence applies to a State bench trial, and to assist the States in applying this standard by discussing its applicability at bar in this wholly circumstantial case wherein the fact-finder considered inadmissible, prejudicial evidence, and the evidence does not exclude every reasonable hypothesis of defendant's innocence.

Conclusion

For any or all of the foregoing reasons, certiorari should be allowed. On the merits, defendant's conviction should be reversed outright for insufficiency of the evidence or for violation of his right to speedy trial; alternatively, the conviction should be reversed with appropriate directions for the Fourth Amendment violation or because evidence of other crimes improperly was considered.

Respectfully submitted,

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APPENDIX

APPENDIX A

61 Ill.App.3d 99
377 N.E.2d 1073

In the Matter of a SEARCH WARRANT.

PEOPLE of the State of Illinois,
Plaintiff-Appellant,

v.

Francis A. MITCHELL,
Defendant-Appellee.
No. 77-887.

Appellate Court of Illinois, First District, Third Division.
May 31, 1978.

McGILLICUDDY, Justice:

The defendant, Francis A. Mitchell, was charged in two-count indictment with the murder of his former mother-in-law, Frances Krejci. (Ill.Rev.Stat., 1971, ch. 38, pars. 9-1, 9-1(a)(2).) The Circuit Court of Cook County granted the defendant's pre-trial motion to quash a search warrant and suppress the evidence seized pursuant to the warrant. The State appeals under Supreme Court Rule 604 (a)(1) (Ill.Rev.Stat., 1977, ch. 110A, par. 604(a)(1)) and contends that the trial court improperly allowed the motion to quash and suppress the warrant on the grounds of probable cause and lack of specificity of the property to be seized.

The search warrant was issued at 11:10 p.m., June 9, 1973, upon the complaint of Officer Michael Ochsner of the Berwyn Police Department. The warrant authorized the search of the defendant's home in Bartlett, Illinois, and directed the seizure of "any clothing, weapons, instru-

ments, articles or contraband which have been used in the commission of or which constitute evidence of the offense of murder." The warrant was executed by Officer Ochsner and the inventory was returned by him on June 10, 1973. The property seized consisted of a 1973 Ford automobile, a desk calendar, and a bag of clothing.

The complaint for the search warrant set forth the following statement as probable cause for the officer's belief that the items described by the warrant were to be found in the defendant's home:

> "On June 9, 1973, at approximately 11:22 A.M., the Berwyn Police Dept. was contacted by Mildred Mitchell of Bonita Springs, Florida and asked to investigate the welfare and condition of her mother, Frances Krejci, of 3622 South Cuyler, Brywyn, Illinois. Milfred Mitchell stated that her [sic] and her father had been brutally assaulted this morning by Miss Mitchell's ex-husband, Frank Anthony Mitchell. I, Officer Michael Ochsner, was assigned to investigate this call. Upon arrival at 3622 South Cuyler, Berwyn, Illinois, I was met by Lillian Beranck, a friend of Mrs. Krejci, who stated that she was expected for lunch but was unable to obtain a response from Mrs. Krejci. Two neighbors at the scene also confirmed that Mrs. Krejci had not been seen since Thursday evening, June 7, 1973, and that their attempts to arouse her were unsuccessful. At this point, I and Sgt. Ahr made a forceable [sic] entry of the premises with the assistance of the Berwyn Fire Dept. Upon entry, I discovered the victim, Frances Krejci, lying at the bottom of a staircase in the hallway. She had severe head wounds. No weapon was found at or near the scene of the crime. Frances Krejci was pronounced dead at 12:24 p.m., June 9, 1973, by Dr. Santiago of the McNeal Memorial Hospital Staff. At this time, Mildred Mitchell telephoned the premises and was appraised [sic] of the condition of her mother. Miss

> Mitchell stated, 'You gotta get my ex-husband, Frank Mitchell.' Miss Mitchell further related that Frank Mitchell had attacked her and her father with a hammer in her home in Bonita Springs, Florida at apprx. 4:15 a.m. on this date (June 9, 1973). She further stated that she telephoned Frank Mitchell at his home in Bartlett, Illinois at 11:30 a.m. this date (June 9, 1973) and found him to be home. She then provided us with the address of Frank Mitchell (465 South Oak Glenn Drive, Bartlett, Illinois). Based upon the facts as set out in this complaint and the strong similarity of this crime and the crimes in Florida, I believe a search of these premises will reveal evidence of this crime."

At the conclusion of counsel's argument at the hearing on the motion to quash and suppress, the trial court commented that one could conclude from the complaint for the warrant that the defendant was a "prime suspect" in the murder, but that one could not conclude that the defendant's home should be searched. The court granted the motion on the grounds that probable cause to search the premises had not been established and that the warrant lacked sufficient specificity in its description of the property to be seized.

The State contends that the complaint for the search warrant established probable cause in that it demonstrated a connection between the attack complained of by the daughter and the situation observed by the officer while investigating the whereabouts of the victim. The State maintains that this is sufficent to reasonably conclude that the defendant perpetrated an offense and that evidence of the offense would be found in the defendant's home. The State further argues that the property designated for the seizure was described with sufficient particularity to establish proper limits to the search. In support of this argu-

ment the State points to the nature and circumstances which were involved in the offense, particularly the facts known to the investigating officer and the fact that this officer also secured and executed the search warrant.

In response to the State's contentions, the defendant argues that the complaint for the warrant failed to demonstrate that an offense had been committed. It is his view that the complaint merely alleges facts which are consistent with an accidental death. Furthermore, the defendant notes that the officer requesting the search warrant merely indicated a belief that evidence of a crime would be found at his home and that the complaint stated no facts which would indicate the presence of such evidence. In short, the warrant is alleged to have permitted the executing officer to undertake a "fishing expedition."

Section 108-3 of the Code of Criminal Procedure sets forth the requirements for the issuance of a search warrant:

> "Upon the written complaint of any person under oath or affirmation which states facts sufficient to show probable cause and which particularly describes the place or person, or both, to be searched and the things to be seized, any judge may issue a search warrant for the seizure of the following:
>
> > "(a) Any instruments, articles or things which have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued." (Ill.Rev.Stat., 1977, ch. 38, par. 103-3(a).)

Probable cause is present when the facts and circumstances within the personal knowledge of the affiant, and of which the affiant has reasonably reliable information, are sufficient to warrant a person of reasonable caution to believe that a crime has been committed and that evidence of such

crime can be found at the premises to be searched. (*People* v. *Francisco* (1970), 44 Ill.2d 373, 255 N.E.2d 413; *People* v. *Isenberg* (1977), 52 Ill.App.3d 426, 367 N.E.2d 364.) Whether the information supplied by the affiant is sufficient to sustain such belief is to be measured by a common sense and realistic approach; all effort should be made to avoid hypertechnical interpretations and doubtful cases should be determined largely by the preference which the law accords to warrants. *People* v. *Thomas* (1975), 62 Ill.2d 375, 342 N.E.2d 383; *People* v. *McGrain* (1967), 38 Ill.2d 189, 230 N.E.2d 699.

When viewed in the light of these principles, the complaint in this matter supports our conclusion that probable cause did exist for the issuance of the search warrant. It is significant to note that the officer who investigated the welfare of the victim and observed the crime scene is the same individual who secured and executed the warrant. The information he obtained firsthand and that supplied by the telephone conversations with the victim's daughter regarding the brutal attacks on her and her father by the defendant in Florida would lead to the conclusion that the defendant had also attacked the decedent. The element of opportunity was adequately supplied by the information that the defendant had returned to his Illinois home. Furthermore, it was reasonable to conclude that evidence of an offense against the deceased would be found in the home of the defendant. There was only a matter of hours between the defendant's alleged attack upon his former wife and his father-in-law in Florida, the finding of the victim's body in Illinois, and the information that the defendant was at his home in Illinois. *People* v. *Hammers* (1976), 35 Ill.App.3d 498, 341 N.E.2d 471, cert. denied, 429 U.S. 1002.

With respect to the sufficiency of the description of the property subject to seizure as evidence of the offense of murder, we note that detailed description of the items was

not possible under the circumstances here involved. Characterization of the items in more general terms was sufficient in light of the nature of the case. Under such conditions, precise description necessarily yields to the concerns inherent in the need for obtaining available evidence as soon as possible before there is an opportunity for its destruction or alteration. Thus, the general description of the items' characteristics is inappropriate where particularity is known to the investigative authorities. (See *People* v. *Holmes* (1974), 20 Ill.App.3d 167, 312 N.E.2d 748—gun known to be involved in offense whereas the warrant simply called for the seizure of a "weapon".) The specificity requirement permits wider latitude in describing items which cannot be known except by characterization and reference to a given offense. (See *People* v. *Curry* (1973), 56 Ill.2d 162, 306 N.E.2d 292—officer directed to seize materials dealing with a "call girl" operation.) The command of the search warrant in this case was not so broad as to have sanctioned a "fishing expedition". Limited by reference to the offense of murder, and further limited in fact by the information contained in the complaint and found at the scene of the alleged offense, information which the executing officer was aware of, the warrant sufficed in compliance with the requirement that the items subject to seizure be particularly described.

Accordingly, the judgment of the Circuit Court of Cook County granting the motion to quash the search warrant and suppress the evidence seized pursuant thereto is reversed and this cause is remanded to that court for further proceedings.

Reversed and remanded.

Jiganti, P.J., and McNamara, J., concur.

APPENDIX B

95 Ill.App.3d 779
420 N.E.2d 415
Second Division
March 3, 1981
No. 80-776

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

FRANCIS A. MITCHELL,
Defendant-Appellant.

Appeal from The Circuit Court of Cook County
Honorable Anthony J. Scotillo, Judge Presiding.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Defendant Francis A. Mitchell was indicted for the murder of his former mother-in-law, Frances Krecji. After a bench trial in the Circuit Court of Cook County, defendant was convicted of murder and sentenced to a term of imprisonment of not less than 35 years nor more than 75 years.

On appeal, defendant raises the following issues: (1) whether he was denied his statutory or constitutional right to a speedy trial; (2) whether the evidence proved him guilty of the murder beyond a reasonable doubt; (3) whether the trial court improperly considered evidence of another crime; (4) whether the length of the sentence was inappropriate; and (5) whether this court erred earlier in reversing the trial court's order quashing a search warrant and suppressing the evidence procured thereunder.

For the sake of brevity and convenience, the chronological facts which relate to defendant's speedy trial argument will be set forth below in the discussion of that contention. Testimony produced at trial will be set forth here.

On June 9, 1973, Frances Krecji (hereafter the victim) was found murdered in her Berwyn home. On that day, defendant was arrested in his Bartlett home and held for the crime.

Defendant's trial commenced on June 7, 1979. He waived his right to be tried by a jury. The state's first three witnesses were Berwyn police officers involved in the case. Officers Michael Oschner and Marvin Ahr, riding in separate squad cars, were directed to the Krecji home at 3622 S. Cuyler in Berwyn by radio call on June 9, 1973. At the scene, the policemen were met by a friend of the victim who had been unable to contact her. The officers found the house to be secured. All windows and doors were locked, with the exception of a partially open window covered by a screen. The Berwyn Fire Department was called for assistance in gaining entry into the house.

A fireman entered the home through the open window by cutting through the screen. He told the officers that the victim was in the house, and let the officers in the front door. The victim's body was found lying on the floor, partially down a stairwell. The victim had several severe wounds to her head and face. The body was lying in a pool of blood, and blood was spattered on the walls. There were no apparent signs of a struggle, nor was there any indication of forced entry into the house. No weapon was found.

While at the house, Ahr answered the phone. The caller identified herself as the victim's daughter, calling from Florida. Ahr was given the name and address of defend-

ant. He called the police department in defendant's village of Bartlett and requested that defendant be arrested.

Berwyn Police Officer Warren Trucksa was sent to the Bartlett station after defendant was taken into custody. He advised defendant of his *Miranda* rights, and informed him that he was being held in relation to the Berwyn homicide as well as the attack in Florida upon defendant's former wife and father-in-law. Defendant told Trucksa that he was in bed at the time and could not have committed the crime. Trucksa noted that defendant had bruises and small cuts on his hands and arms. Defendant was taken to the Berwyn police station and processed.

Officer Oschner took the victim's body to the hospital. He then proceeded to the DuPage County Courthouse, where he was joined by Officer Trucksa and several other policemen from Berwyn and Bartlett. A search warrant for defendant's house was procured. Forced entry was made into the building. The garage contained a 1973 Ford auto. Oschner and Trucksa each noticed blood stains on the car's front seat. Later analysis of these stains showed them to be of the same type blood as the victim, as well as of defendant's former wife. In the house, Trucksa found some clothing and a desk calendar with writing on it. These items were seized.

On the following day, Trucksa transported defendant to the hospital for treatment of the cuts on his hands. Defendant stated that they occurred when he was cutting his lawn with a sickle.

Dr. Edward Shalgous testified that he supervised the autopsy of the victim. She had suffered four distinct blows to the head. The injuries were forcefully caused by a heavy-type object. They were of a type compatible with heavy hammer blows. The autopsy was conducted on the afternoon of June 9, 1973. The victom had died at least 16 and possibly 24 hours prior to autopsy.

Mary Ann Smith, a friend of defendant's former wife, testified to a conversation with defendant held in September 1972. Defendant regretted having been separated from his wife. (At that time they were reconciled.) Defendant told the witness that the victim was the cause of his marital problems. He stated that anyone who interfered in his marriage in the future would be killed by him. Several weeks later, the witness talked with defendant by phone. He was again separated from his wife. He became very emotional and blamed the problems on the victim.

The victim's daughter-in-law testified that in late April or early May 1973, defendant made an unexpected visit to her house. Defendant was divorced from his wife. He told the witness that the divorce had broken his heart. He blamed the victim for causing his marriage to fall apart.

The daughter-in-law last saw the victim alive on June 7, 1973. The next day she was unable to contact the victim. Early in the morning of June 9, 1973, the witness received a call from the victim's daughter, defendant's former wife. After the call, the witness and her husband drove to the Berwyn home. They received no answer to their knocks, and found all the doors locked. Later in the day, the witness called the Berwyn home. A police officer answered and told the witness that the victim was dead.

On cross-examination, the daughter-in-law related an incident told to her by defendant in which the victim refused to allow defendant into her house to visit his child. The victim never allowed defendant into the house following the divorce.

Mildred Mitchell, former wife of defendant and daughter of the victim, testified that she had married defendant in March 1961. They had a son on May 27, 1972. In June 1972, she left defendant for a week and lived with her parents in Berwyn. In September 1972, she spent a month

at her parents' new home in Florida. In mid-October 1972, she left defendant and lived with her parents in Berwyn.

Mitchell received calls from defendant after leaving him. He was angry and accused the victim of causing the separation. When the witness returned to her former home to pick up some belongings, she found the locks changed. A key to her parents' Berwyn home may have been left behind by her in defendant's house.

In December 1972, the witness moved to Florida with her parents. She sent defendant drawings, floor plans, and pictures of the house. In April 1973, defendant came to Florida. He attempted to talk his way into the house but was unsuccessful. Defendant later phoned and asked about the sleeping arrangements in the house. The witness explained them to the defendant.

In mid-April 1973, the victim returned to Berwyn to sell the house there.

On June 9, 1973, Mitchell was awakened in the Florida house, being beaten on the head. She ran from the assailant and saw her father leaning against a window with blood running down his head. At that point, she saw that the assailant was defendant. He was wearing gloves and was carrying a "shiny hammer." The witness ran outdoors and defendant fled.

Later, when Mitchell returned to the house, she called the Berwyn home. There was no answer. She called her brother in North Riverside and also called defendant's home in Bartlett. The witness next called the Berwyn police and asked them to check on the victim. Later, she again called the Berwyn house. A policeman answered. The witness told him of the Florida attack, stated that defendant had killed her mother, and gave the police defendant's name and address.

Mitchell identified the calendar seized from defendant's home as belonging to him. She stated that defendant was always making notes to himself, writing one for practically every action he took. She identified his writing on pages of the calendar.

Neighbors of the Krecjis in Florida also testified concerning the events of June 9, 1973.

Paul Moore related that he was the owner and operator of a taxi company. Moore had received calls and visits from a man he identified as defendant, concerning transportation from defendant's home to O'Hare airport. June 8, 1973 was finally settled upon by defendant for the trip. In the late afternoon, Moore picked up defendant at his home. On the drive to O'Hare, defendant asked Moore if one could buy an airline ticket without identification. At the airport, defendant was dropped off at the Northwest Orient terminal. He asked Moore to wait 10 minutes in case he was unable to buy a ticket. When defendant did not appear, Moore left.

The final witness was Maureen Casey, a documents examiner for the Chicago Police Department. She had examined the desk calendar. Writings visible on certain pages therein were stipulated to be those of defendant. Other "indented" writings, which resulted from writings done on another page placed on the "indented" page, were identified as having been made by defendant. The witness was able to identify some of the "indented" writings. Among them were:

> "Next get to killing of everyone, but the baby."
>
> "Get over quickly."
>
> "Place anonymous phone call to M."
>
> "Until you next reach them. This is *very* important. If you fly, call at each layaway. If you still get no answer, call from O'Hare direct * * *."

The writings were made readable in part by the witness's use of red ink on the pages.

The state rested after this witness. The defense presented no evidence. The court convicted defendant of murder.

At the sentencing hearing, the trial court was presented with factors in aggravation and mitigation. After considering these factors, the court sentenced defendant to a term of not less than 35 nor more than 75 years.

I.

Defendant contends that he was denied both his statutory and constitutional speedy trial rights during the six-year period between his initial arrest and the commencement of trial.

A.

Defendant was arrested on June 9, 1973. Sixty-one days later, on August 9, a Cook County grand jury returned a No Bill on the murder charge. Prior to that date, Florida had filed a detainer on defendant in connection with battery charges arising out of the incident involving defendant's former wife and father-in-law. Defendant thus remained in custody in Cook County after August 9 on the basis of the detainer, while there were no Illinois charges pending against him after that date. He was released on bail on October 10, 1973.

In Florida, defendant entered a guilty plea on the battery charges and was imprisoned. Meanwhile, another Cook County grand jury returned an indictment of defendant for murder on December 20, 1974. This indictment contained a technical error and was superseded by a corrected indictment issued January 31, 1975.

On March 11, 1975, the state of Florida offered to deliver temporary custody of defendant to Illinois for trial on the murder charge. In early May, defendant returned to Illinois. He was arraigned on May 26, 1975, at which point the case was continued by agreement.

On April 6, 1976, defendant filed a motion for discharge based upon speedy trial grounds. The motion alleged that defendant's speedy trial right was violated in 1973 when he was held in custody without trial from June 9 to October 10, a period of more than 120 days. This motion was denied, and defendant does not reargue its merits here. Later, another motion to discharge based upon speedy trial grounds was filed. This motion alleged that defendant should have received credit for 61 days of a speedy trial term for the period of custody which occurred in 1973 (covering June 9 to August 9). The motion additionally alleged that this term began to run again on day 62 when defendant "filed a request for trial" (the Florida offer of delivery). According to the reasoning of the motion's argument, defendant was then denied his right to speedy trial when the next delay occasioned by him did not occur until 137 days into the term, on May 26, 1973, when he agreed to a continuance after arraignment. The trial court denied the merits of this motion. The argument contained in the second motion is reiterated by defendant to this court.

The speedy trial statute in part provides that "(e)very person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, * * *." (Ill. Rev. Stat. 1979, ch. 38, par. 103-5(a).) A term under this provision began to run when defendant was taken into custody on June 9, 1973. Upon return of the No Bill by the grand jury, de-

fendant was no longer in custody on any pending Illinois charges. Thus, the speedy trial term was no longer operative. The issue, of course, is whether the 61 days which had accrued on the term up to that point were erased by the return of the No Bill, or whether the term was merely suspended by this circumstance, as argued by defendant.

No cases cited by either party address this exact issue. *People* v. *Sanders* (1st Dist. 1980), 86 Ill. App. 3d 457, 407 N.E.2d 951, involves a somewhat similar set of circumstances. In *Sanders*, a speedy trial claim arose after the state procured a *nolle prosequi* of the charges during the term. The court examined three types of situations in which charges are dismissed and later reinstated, and the effect such dispositions have upon the speedy trial rights of the defendant. The situations included (1) a finding of no probable cause at a preliminary hearing, (2) an SOL (striking of the charges with leave to reinstate), and (3) a *nolle prosequi*. The court noted that in the first situation, the time which has elapsed on a speedy trial term prior to the finding of no probable cause is erased upon that finding, absent a showing that the state purposely secured that finding as a dilatory tactic. In contrast, the term continues to run when the state procures an SOL, since in that situation the charges lie in a "dormant" state and may be resurrected at any time on motion of the state; further, the SOL itself is a product of the state's own act. The court held that, in the situation involving a *nolle prosequi*, the term continues to run if the defendant is held in custody or on bond or recognizance, but is tolled in situations in which defendant is free to go.

We find the present circumstances to be most analogous to a finding of no probable cause. The latter finding involves an independent judicial determination which, absent a showing to the contrary, is presumptively free of

prosecutorial manipulation. Similarly, return of a No Bill by a grand jury is an independent action which is presumptively free from prosecutorial manipulation. Of course, a showing to the contrary may also be made in this situation. However, absent such a showing, the speedy trial term ceases to run upon return of the grand jury's decision, and a wholly new term commences to run if the defendant is later indicted.

We have been presented with nothing in the record which is sufficient to overcome the presumption that the grand jury's return of the No Bill was an independent act. There is no evidence that the state procured this finding as a dilatory tactic. Thus, the 61 days of the term which elapsed in 1973 must be considered erased upon return of the No Bill, which left no Illinois charges pending against defendant.

As a result, a new speedy trial term began to run at some point in 1975. For the purposes of the speedy trial statute, the defendant must be in the custody of the state (or on bail or recognizance) before such a term can begin to run. (Ill. Rev. Stat. 1979, ch. 38, par. 103-5(a,b); *People* v. *Sanders, supra,* 86 Ill. App. 3d at 466.) Defendant was not under Illinois custody here until sometime in May 1975, notwithstanding his "request for trial" from Florida sent March 11, 1975. On May 26, 1975, the case was continued by agreement. This is a delay occasioned by defendant. Under the speedy trial statute, for crimes committed prior to March 1, 1977, any such delay tolls the term and causes a wholly new term to commence on the date to which the case is continued. (*People* v. *Donalson,* (1976), 64 Ill. 2d 536, 540, 356 N.E.2d 776.)) Therefore, the term which commenced upon defendant's return to Illinois custody sometime in May 1975 was tolled on May 26. No speedy trial violation occurred up to this date, and the trial court

correctly denied defendant's motion concerning this time period.

Defendant's brief confuses the speedy trial provisions of the Uniform Agreement on Detainers (Ill. Rev. Stat. 1979, ch. 38, par. 1003-8-9, art. III(a)) in making this argument.[1] Under that statute, a defendant in the custody of another state who has charges pending against him in Illinois, must be brought to trial in Illinois within 180 days of the time he causes to be delivered written notice of his place of imprisonment and a request to be tried. Here, Florida forwarded an offer to remit defendant for trial on March 11, 1975. While it may be debated whether this is the type of notice envisioned by the detainer statute, resolution of that question is not crucial to a determination of defendant's speedy trial claim thereunder. As noted, defendant's case was continued at his behest (in part) on May 26, 1975. Clearly, 180 days had not then passed since the previous March 11. Thus, no violation of the speedy trial provision of the detainer statute is present.[2]

B.

On October 7, 1976, defendant demanded trial. He states that this date serves as the beginning of the speedy trial term for the purposes of his second speedy trial argument. On January 5, 1977, defendant filed a motion to quash the

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[1] Defendant states that "the question is currently open in this state as to whether pre-trial delays while the defendant has a pending Illinois charge, but is in custody of another state, can be included in the term * * * under section 103-5." A careful reading of the statute demonstrates, as noted above, that a defendant must be in custody in Illinois before section 103-5 is applicable.

[2] Compare *People* v. *Holleman* (1st Dist. 1980), 82 Ill. App. 3d 409, 402 N.E.2d 784.

search warrant for his home and to suppress evidence seized thereunder. On January 12, 1977, the trial court granted this motion. The state appealed that finding on January 17. The Third Division of this court reversed the trial court on May 31, 1978. (*People* v. *Mitchell* (1st Dist. 1978), 61 Ill. App. 3d 99, 377 N.E.2d 1073.) Defendant filed a petition for leave to appeal with the supreme court. This petition was denied. (71 Ill. 2d 612.) The mandate from this court issued on October 31, 1978, and was received by the circuit court on November 6, 1978.

On February 14, 1979, defendant filed a motion to discharge under the speedy trial statute. The argument asserted here is that the filing of the motion to quash *suspended* the term under the statute, but did not *vacate* it. Defendant alleges that 85 days were already on the term (covering October 7, 1976 to January 5, 1977) when the case was redocketed in the circuit court on November 6, 1978. According to this argument, the term began running again on that date, at day 86. When the motion to discharge was filed on February 14, 1979, the term would have been at day 185, under defendant's reasoning. This, he alleges, was a violation of his speedy trial right.

Defendant cites *Donaldson, supra,* in support of this argument. However, *Donaldson* defeats defendant's contention. That case holds, for crimes committed prior to March 1, 1977, that any delay caused by defendant serves to *vacate*, not suspend, the speedy trial term. We note that on January 12, 1977, defendant supplemented the motion to quash with an amended motion to dismiss based on discovery grounds. We find that the combination of these motions constituted a delay attributable to defendant. Thus, defendant's motions erased the accumulated 85 days. On November 6, 1978, the term started to run anew. Defend-

ant was out on bail at that time, so that the state was given 160 days to bring him to trial. (Ill. Rev. Stat. 1977, ch. 38, par. 103-5(b).) This term had not run by February 14, 1979. Defendant's statutory speedy trial rights were not violated during this time period.

C.

Defendant contends that the overall length of time between his initial arrest and the date that trial finally began violated his constitutional right (6th Amendment, U.S. Constitution) to a speedy trial.

The United States Supreme Court has held that it is impossible to determine with precision when the constitutional right to a speedy trial has been denied. Inquiry into a speedy trial claim must necessarily involve a functional analysis, made in the context of each particular case. The factors to be considered include the length of the delay, the reasons for it, the presence of a defendant's assertion of the right, and the type of prejudice caused by the delay. (*Barker* v. *Wingo* (1975), 407 U.S. 514, 521, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182.) Compliance with the speedy trial statute usually precludes the possibility of a violation of the constitutional right, since the latter protects against only arbitrary and oppressive delay. *People* v. *Nowak* (1970), 45 Ill. 2d 158, 161, 258 N.E.2d 313.

Here, defendant spent six years between the initial arrest for the murder and the commencement of trial. However, this lengthy span cannot be viewed as a single block of time. Rather, the particular context of that period must be examined.

From August 9, 1973 to December 20, 1974, there were no charges pending against defendant in Illinois. Defendant calls the state's activity during this period an un-

reasonable failure to secure an indictment. The state admits that the record is unclear as to what transpired during this period, but asserts that the state was using the time to continue its investigation in order to accrue additional evidence to present to a grand jury.

The constitutional speedy trial protections are not available to one not yet accused of a crime, nor do they require the state to discover, investigate, and accuse a person within a particular period of time. It is either formal indictment or information or else the actual constraints imposed by arrest and holding to answer a criminal charge that engage the constitutional speedy trial protections. (*United States* v. *Marion* (1971), 404 U.S. 307, 313, 320, 30 L. Ed. 2d 468, 92 S. Ct. 455.) Here, although defendant was in fact arrested for the crime of murder of which he was eventually convicted, that arrest did not lead either to an indictment or conviction, since a grand jury returned a No Bill. During the period in question, defendant was effectively free from the type of constraints which we believe the Supreme Court envisioned in setting forth the *Marion* holding. (See *People* v. *Toney* (1st Dist. 1978), 58 Ill. App. 3d 364, 374 N.E. 2d 695, *leave to appeal denied*, 71 Ill. 2d 605; compare *Dillingham* v. *United States* (1975), 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303.) Defendant provides nothing of substance either in evidence or in case law to buttress his claim that the delay under consideration served to prejudice those interests which have been identified as the bases for the speedy trial protection found in the Constitution. (See *United States* v. *Marion*, *supra*, 407 U.S. at 320.) We therefore find that there was no violation of defendant's constitutional speedy trial right during the 1973-74 period.

The next major period of delay covers the time from defendant's arraignment in Illinois on May 26, 1975, until

his filing of the motion to quash in January 1977. During the majority of that time, until October 7, 1976, defendant either agreed to or himself requested continuances. As previously noted, he demanded trial on the latter date. However, before the statutory speedy trial term starting then had expired, defendant filed the motion to quash. The ensuing proceedings covered the period of January 1977 to November 6, 1978. None of this time can be attributed to the state's actions. Thus, no constitutional violation resulted there.

The state was responsible for delays from November 1978 to February 1979. However, this period was not of sufficient length to violate the statutory speedy trial term. The remaining period of time prior to trial involved delays caused as much by defendant as the state. No violation of rights is assignable to this time frame.

Clearly, the amount of time involved in this case is unfortunate. Nonetheless, the peculiar facts of the case, including the out-of-state conviction of defendant, the lengthy interlocutory appeal, and defendant's own dilatory actions preclude a finding of a violation of the constitutional speedy trial protection. Defendant has no valid grounds in the record to demand discharge based on his speedy trial rights.

II.

Defendant contends that he was not proved guilty of murder beyond a reasonable doubt.

The evidence presented at trial which linked defendant to the crime was entirely circumstantial. A conviction for murder may be based solely upon circumstantial evidence so long as that evidence eliminates every reasonable hypothesis of innocence. The evidence must be of a conclusive nature and lead on the whole to a satisfactory con-

clusion which produces a reasonable and moral certainty that the accused, and no one else, committed the crime. (*People* v. *Hayes* (1st Dist. 1979), 70 Ill. App. 3d 811, 820, 388 N.E.2d 818, *leave to appeal denied*, 79 Ill. 2d 614.) It is for the trier of fact to determine the credibility of witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence. (*People* v. *Akis* (1976), 63 Ill. 2d 296, 298, 347 N.E.2d 733.) This court will not reverse such determinations unless the evidence raises a reasonable doubt as to the guilt of the defendant.

The evidence presented at trial has been summarized above and will not be repeated here. The assertions made in defendant's brief concerning various evidentiary matters are nothing more than a reargument of the case presented below. Nothing contained in those assertions raises a reasonable doubt as to defendant's guilt. A careful examination of the record as a whole and of each individual's testimony demonstrates that the decision of the trier of fact as to defendant's guilt beyond a reasonable doubt is supported by the record.

III.

Defendant contends that the trial court improperly considered evidence of the crime of battery he committed upon his former wife and father-in-law in Florida.

Generally, evidence of crimes other than that with which the defendant is charged is inadmissible. There are, however, certain well established exceptions to this rule. Evidence which goes to show motive, intent, absence of mistake, or *modus operandi* is admissible despite the fact that it may show the commission of a separate crime by the defendant. (*People* v. *Kavinsky* (1st Dist. December 9, 1980), ... Ill. App. 3d ....., ... N.E.2d ..... (slip op. at 14).) This is true even where the other crime is committed subsequent to that for which defendant is on trial.

People v. *Campbell* (5th Dist. 1975), 28 Ill. App. 3d 480, 489, 328 N.E.2d 608.[3]

Here, the similarity of the attack in Florida with the results in Berwyn brings the evidence of the former crime within the purview of *modus operandi*. Defendant errs when he asserts that the only purpose for considering evidence of the former crime here is to show identity (a purpose for which evidence of subsequent crimes is not allowed). Thus, the evidence which is disputed here was admissible. The trial court made no error in considering it.

IV.

Defendant contends that the trial court erred in entering the sentence which it gave to defendant.

The standard of review of a sentence claimed to be excessive is whether in fact the trial court exercised its discretion and, if so, whether this discretion was abused. (*People* v. *Cox* (1980), 82 Ill. 2d 268, 275, 412 N.E.2d 541, which rejected the "rebuttable presumption" standard urged by defendant.) Here, defendant was found guilty of the brutal murder of his former mother-in-law. He chose to be sentenced under the "old" sentencing statute (Ill. Rev. Stat. 1977, ch. 38, par. 1005-8-1(b)(1)) which provided for any indeterminate term in excess of 14 years for a conviction of murder. The trial court was presented with numerous facts in aggravation and mitigation. The record indicates that the court carefully considered these

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[3] Defendant appears not to be apprised of this rule. He cites this court to some general language contained in *People* v. *Chronister* (1942), 379 Ill. 617, 622-23, 41 N.E.2d 750, for the proposition that evidence of subsequent crimes is never admissible because it is contrary to the presumption of innocence. The supreme court later narrowed this holding with clarifying language in *People* v. *Lehman* (1955), 5 Ill.2d 337, 343, 125 N.E.2d 506. Defendant's argument is therefore lacking in merit.

factors in rendering sentence. We can find nothing in the record to demonstrate that the trial court abused its discretion. Thus this court has no option under *Cox* but to affirm the sentence entered.

V.

Defendant contends that this court improperly reversed the trial court's order which quashed the search warrant and suppressed the evidence seized thereunder.

It is well settled that a judgment of a reviewing court is *res judicata* to all issues raised before it. Further, all issues which could have been raised, but were not, are deemed waived. (*People* v. *Willis* (1st Dist. 1979), 79 Ill. App. 3d 617, 620, 398 N.E.2d 861.) Also, issues not raised in a motion to quash which relate thereto are not properly before this court and are forever waived. (See *People* v. *Edwards* (1st Dist. 1976), 35 Ill. App. 3d 807, 809, 342 N.E.2d 800.) In light of these principles, we find absolutely no merit in this contention of defendant.

For the foregoing reasons, the judgment and sentence of the trial court are affirmed.[4]

Affirmed.

HARTMAN, P.J., and STAMOS, J., concur.

---

[4] We do wish to make note of the following for the benefit of defense counsel here and of the practicing bar. Supreme Court Rule 342 provides that "[t]he appellant's brief shall include, as an appendix, * * * a complete table of contents, with page references of the record on appeal." (Ill. Rev. Stat. 1979, ch. 110A, par. 342(a).) The purpose of this rule is to assist the reviewing court in examining the record and assessing the merits of the appellant's contentions. Such an appendix is especially useful on a criminal appeal when a question as to whether a defendant was proved guilty beyond a reasonable doubt is raised. In this case, defendant's appellant's brief was wholly lacking in an appendix and was thus not in conformity with the rule. It is urged that greater attention be given to the directives of the rule in the future.

APPENDIX C

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, ILL 62706
(217) 782-2035

October 19, 1981

Mr. Julius L. Echeles
Attorney at Law
35 E. Wacker Dr., S#3500
Chicago, IL 60601

No. 55114 — People State of Illinois, respondent, vs. Francis A. Mitchell, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX D

Facts re Deprivation of Right to Speedy Trial

Defendant was arrested on June 9, 1979, and charged with the murder of Frances Krejci, his mother-in-law. (R. 3, 816) He was held without bond (R. 3), and transferred to Cook County Jail on June 12, 1973 (R. 829). After a Grand Jury proceeding on August 8, 1973, the Grand Jury did not indict, returning a No Bill on August 9, 1973. (R. 908, *et seq.*, 6) On that date, a detainer was

lodged against Mitchell by the State of Florida. (R. 5) He posted the bond on the Florida detainer on October 10, 1973, and was released from Cook County Jail on that date. (R. 4) He was later imprisoned on the Florida matter in February, 1974. (R. 225)

Another Grand Jury proceeding was held on December 20, 1974 while defendant was incarcerated in Florida on a battery conviction. (R. 882, *et seq.*) At that time, the Illinois Grand Jury returned a true bill on indictment number 74-6721. The State nolle prossed that indictment at defendant's arraignment in Cook County, Illinois on May 26, 1975, and superseded that indictment with another, number 75-852. (813b) Previously, on March 11, 1975, defendant had requested he be transferred from his incarceration in Florida and be tried on the Cook County murder charge. (R. 921-22) The State filed the instant charge against defendant as soon as he was released from Florida on parole. (R. 26) His bond on the murder charge was set at $50,000.00 on June 9, 1976. (R. 791)

On April 9, 1976, defendant moved to dismiss the murder charge against him, due to the State's failure to try him, even though he had been held in custody more than 120 days in 1973. (R. 815) At the hearing on this motion on July 16, 1976, defendant argued that he had been held in custody from June 9, 1973 to October 10, 1973, a total of 123 days, and that the charges against him must be dismissed for failure to try him in that period. (R. 6) Defendant also insisted that he had demanded trial while in Florida custody. (R. 21) The State argued that as of August 9, 1973, when the Grand Jury returned a No Bill, defendant was no longer in custody on the Illinois charge, but was held in Cook County Jail pursuant to the Florida detainer. (R. 7) The defense noted that in 1975, defendant had been indicted for exactly the same offense he had been charged with in 1973, and therefore, that the dismissal

of the 1973 indictment did not vacate the period defendant was held in custody when he was reindicted in 1975. (R. 8-9, 25) The court, however, held that the reindictment in 1975 vacated all previous time Mitchell had been held in custody before the date of the 1975 indictment, and denied defendant's motion to dismiss. (R. 28)

On January 5, 1977, defendant filed another motion to dismiss the charges against him, due to the State's failure to provide defense counsel with any discovery materials for a year and a half. (R. 35, 844) At the hearing on this motion on that date, defense counsel represented he had been forced to move for a continuance on previous dates due to the State's failure to provide him with the discovery materials necessary for certain pre-trial motions. (R. 49) The prosecutor responded that he had not personally been responsible for the file in this case during the previous 18 month period, and there had been no "firm order" for discovery. (R. 52) This motion was eventually denied by the court on June 7, 1979. (R. 302)

On January 5, 1977, defendant also moved to quash his search warrant of June 9, 1973, and to suppress all evidence seized as a result of that search (R. 842-843) on the theory that the warrant issued was a "general warrant". (R. 876g) That motion was granted on January 12, 1977. (R. 876, *et seq.*) Defendant demanded trial pursuant to the court's ruling. (R. 876kk) The State appealed the ruling on January 17, 1977. (R. 877) On May 31, 1978, the Appellate Court reversed the trial court's order suppressing the evidence seized on June 9, 1973, and remanded this cause for a trial. (R. 883) (See App. A, p. App. 6) Defendant's Petition for Leave to Appeal to the Illinois Supreme Court was denied. (R. 220) The mandate of the Appellate Court was issued on October 31, 1978, and docketed with the Circuit Court of Cook County on November 6, 1978. (R. 883-84) On January 23,

1979, the defendant renewed his motion to dismiss the charge and him due to the State's failure to comply with discovery. (R. 116)

On February 14, 1979, defendant filed an additional petition for discharge, alleging that the instant case must be dismissed (1) for failure of the State to try him within 120 days while incarcerated in 1973; and (2) for the failure of the State to try him within 160 days under the current indictment number once the defendant demanded trial while on bond. (R. 902-04) At the proceedings on February 26, 1979, the defense argued, in connection with its earlier motion to discharge the defendant due to the State's failure to provide him with the necessary discovery materials, that the State had intentionally withheld information from the Grand Jury in 1973, in order that it could use the evidence which later came to light pursuant to Mitchell's Florida conviction. (R. 201) Defense counsel had not argued this when he had first presented this motion in 1973, since the State's failure to provide him with the Grand Jury minutes at each proceeding, in 1973 and 1974, had not called it to his attention. (R. 202) Defense counsel requested that he be allowed to call the foreman from the 1973 Grand Jury proceedings, which the State responded was impermissible. (R. 207-08) On March 1, 1979, the court denied any evidentiary hearing concerning the 1973 Grand Jury proceedings. (R. 249)

On that date, the court also denied defendant's motion for a discharge because of the State's failure to take him to trial within 160 days, after he had made bond upon his return from Florida. (R. 254) The court ruled that once the State had appealed the court's motion to suppress, the time accumulated by the defendant for purposes of speedy trial was "tolled" and that the time accumulated was vacated once the mandate issued from the Appellate Court remanding the case. (R. 253) Mitchell had pre-

viously demanded trial on October 7, 1976, and again demanded trial on January 12, 1977, when the court granted his motion to suppress. (R. 791, 876kk) After the mandate issued, defendant continued in his demand for trial. (R. 793) The court, however, held that all time previous to the issuance of the mandate by the Appellate Court was not relevant to defendant's speedy trial demand. (R. 253)

On March 1, 1979, defendant also argued that the State had failed to try him within 120 days while he was held in custody on a charge that he murdered Frances Krejci. Defendant had previously presented this theory on July 16, 1976, when his motion for discharge was denied by another judge. (R. 29) Defendant argued on March 1, 1979, that the time he was held in custody in 1973 before the Grand Jury returned a No Bill must be included along with the time he was incarcerated in Florida, after Mitchell had requested on March 11, 1975, under the Uniform Agreement on Detainers, that he be tried in Illinois after the State had successfully obtained an indictment from the Grand Jury in December, 1974. (R. 227) Although the court made no specific ruling on this motion on March 1, 1979, it indicated on June 7, 1979, that all pending motions made by the defendant had been denied. (R. 301) Defendant's motion for a hearing to determine the good faith of the State's Attorney in obtaining the No Bill was denied.

On March 15, 1979, and again on April 18, 1979, defense counsel noted that he had still not been provided with a report from the State fixing the time of death of Frances Krejci, the victim. (R. 269, 290) The State responded that defense counsel had not informed them of any alibi defense pursuant to their discovery motion. (R. 270, 290) Defense counsel answered that he could not give a list of alibi witnesses until he knew the time of Krejci's death. (R. 270, 290)

Opposition

Office - Supreme C
FILE
FEB 4

No. 81-1129

In the Supreme Court of the United States

October Term, 1981

FRANCIS A. MITCHELL,
Petitioner,

vs.

THE STATE OF ILLINOIS,
Respondent.

Upon Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

On January 31, 1975, the defendant, Francis Mitchell, was indicted by a grand jury of Cook County, Illinois, and charged with the murder of his former mother-in-law, Frances Krejci. (R. 28, 221, 225, 807) Following a bench trial in the Circuit Court of Cook County, Illinois, the defendant was found guilty of the murder and sentenced to serve 35 to 75 years imprisonment in the custody of the Illinois Department of Corrections. (R. 746-47, 782)

Earlier, namely on June 9, 1973, the defendant had been arrested for the same murder. (R. 3) The defendant waived a preliminary hearing on July 9, and on August 9, 1973, a grand jury refused to indict the defendant on the murder charge. (R. 3-4) While in custody following the arrest on June 9, officials of the State of Florida placed a detainer against the defendant prior to the return of the no bill on August 9. Pursuant to the Florida detainer the defendant was held in custody in Illinois until October 10, 1973, when he was released on bond as to the Florida charges. (R. 5-6) Later the defendant was convicted on the Florida charges and imprisoned in that State. (R. 225, 670)

On December 20, 1974, the grand jury of Cook County, Illinois, reexamined the murder charges and indicted the defendant for the June 1973 murder of Frances Krejci. (R. 882(a), at 11) The indictment was superceded by a subsequent true bill returned January 31, 1975, due to a typographical error in the form of the December 20 indictment. (R. 28, 221, 225, 807) At this time the defendant was in custody in Florida following conviction there on the detainer charges. On March 11, 1975, Florida offered to deliver the defendant into the temporary custody of Illinois officials for proceedings on the murder indictment . (R. 921) The defendant was arraigned on the murder charge on May 26, 1975.

(R. 228, 831(a), at 1-4) At this time the defendant agreed to a continuance. (R. 229, 790) On April 1, 1976, the defendant was discharged from custody of the State of Florida and placed on parole. (R. 26) At this time Illinois filed the murder charges, and bond in the amount of $50,000 was set on June 9, 1976. (R. 26, 791)

On April 9, 1976, the defendant had moved for discharge from the murder indictment for failure of Illinois to bring him to trial in 1973 within 120 days of his arrest. (R. 790, 815) The motion was denied on July 16, 1976, the Circuit Court of Cook County holding that the defendant was in custody on the murder charge only from June 9, 1973, to August 9, 1973, when the grand jury returned a no bill. (R. 6) From August 9, 1973, to December 20, 1974, no Illinois charges were pending against the defendant and he had been held in custody in lieu of bond until October 10, 1973, only in respect to the Florida detainer charges. (R. 6) The indictment of January 31, 1975, operated as a new charge according to the court, and prosecution of that charge was properly proceeding. (R. 28-29) On October 7, 1976, the defendant demanded trial on the murder indictment. (R. 791)

On January 5, 1977, the defendant filed a motion to quash a search warrant pertaining to his home and issued in June 1973 prior to the original arrest; the motion also asked that evidence seized pursuant to the warrant be suppressed. (R. 842) A motion to dismiss based upon failure of the State of Illinois to comply with a discovery request was also filed at this time. (R. 844, 35, 43) The motion to quash the warrant and suppress the evidence was granted on January 17, 1977. (R. 873(a), at 1-31) On the day the motion to quash and to suppress was granted Illinois filed its notice of interlocutory appeal; the Appellate Court of Illinois, First District, reversed the trial court's order quashing the warrant and suppressing the evidence on May 31, 1978. The opinion of the appellate

court is appended to the Petition for Writ of Certiorari as Appendix A (*In* re *Search Warrant (People* v. *Mitchell)* (1st Dist. 1978) 61 Ill. App. 3d 99, 377 N.E.2d 1073.) The defendant sought further review of the appellate court's decision from the Supreme Court of Illinois; this review was denied. (R. 220) The mandate of the appellate court was filed with the circuit court of Cook County on November 6, 1978, at which time the case was redocketed. (R. 174, 218, 220)

On January 12, 1979, argument was heard on the defendant's motion *in limine,* this motion was originally made on January 10, 1977, but had not been ruled upon at that time. (R. 56-58, 873(a)) The motion concerned the defendant's request that evidence of the defendant's acts and his conviction in Florida be excluded from the trial of the instant case. (R. 58-59) The trial court ruled that the Florida acts (concerning attacks on the defendant's former wife and father-in-law — respectively daughter and husband of the deceased victim, Frances Krejci — at a time near the death of the murder victim) would be admissible into evidence as components of a completed crime, demonstrating motive, and because they were committed close in time to the murder charge and placed that charge within a context of the entire transaction of which it was a part. (R. 74-76) The court, however, emphasized that each piece of evidence would be examined individually as the trial progressed. (R. 77)

On February 14, 1979, the defendant filed a second motion for discharge raising statutory and constitutional violations of the right to speedy trial. Again the defendant put forth the original claim that related to the time held in custody following the arrest in June 1973, arguing further that the time spent in custody then should be considered in computation of the period within which he should have been brought to trial following the indictment in January 1975. Additionally the defendant claimed that he had demanded trial on the new in-

dictment concurrently with the offer made by Florida to release him into Illinois custody on March 11, 1975, and that this "demand" should trigger the 160 days provided by the Illinois statute within which the State must try an individual not in custody who is demanding trial. Finally the defendant argued that he had not been brought to trial within 160 days of his demand for trial made October 7, 1976. (R. 150)

The second motion for discharge was argued on February 26 and March 1, 1979, and denied on the latter date. (R. 160, 216, 254) On June 7, 1979, 98 days following the denial of the second motion for discharge, the defendant waived the right to trial by jury and his trial commenced before a judge of the Circuit Court of Cook County. (R. 303-309) The particularities concerning the denial of the motion for discharge and the evidence given during the trial are complex; however, these matters are clearly set forth in the opinion of the Appellate Court of Illinois, First District (*People* v. *Mitchell* (1st Dist. 1981), 95 Ill. App. 3d 779, 420 N.E.2d 415), and appended to the Petition for Writ of Certiorari as Appendix B.

Following the bench trial the defendant was found guilty of the murder of his former mother-in-law. The Appellate Court of Illinois affirmed the conviction on March 3, 1981, further effort by the defendant to appeal the case to the Supreme Court of Illinois was denied on October 19, 1981. The Petition for Writ of Certiorari was timely filed on December 16, 1981.

REASONS FOR DENYING THE WRIT

In large measure the reasons for denying the writ of certiorari are set forth in the two opinions of the Appellate Court of Illinois, First District. (*In* re *Search Warrant* (*People* v. *Mitchell* (1st Dist. 1978), 61 Ill. App. 3d 99, 377 N.E.2d 1073;

People v. *Mitchell* (1st Dist. 1981), 95 Ill. App. 3d 779, 420 N.E.2d 415.) (Appendices A and B to the Petition for Writ of Certiorari.) The issues raised by the Petition as reasons for granting the writ concern 1) denial of the Constitutional right to speedy trial; 2) search and seizure violative of the fourth amendment; 3) prejudicial "other crimes" evidence and 4) lack of proof beyond a reasonable doubt. In one form or another, these issues were all addressed by the Illinois courts; however, neither of the last two points were addressed in terms of the Federal Constitutional dimensions the defendant-petitioner now seeks to assign them.

Rule 17 of the Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> * * *
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in conflict with applicable decisions of this Court.

Given the guidelines of Rule 17, the present Petition raises two issues which arguably fall within the perimeters of subparagraph (c), namely, the speedy trial and search and

seizure issues. These issues, however, are ones addressing the factual circumstances in light of established law. There has been no showing by the Petition that the decisions concerning these issues have been premised upon an understanding of basic principles of constitutional jurisprudence which can be seen as antithetical to the decisions of this Court. As mentioned already, the other crimes evidence issue and the reasonable doubt issue were not presented to the Illinois courts as issues of Federal law, and there is no decision from the state court on either of these matters which amounts to the decision of a federal question. In summary, the Petition presents no "special or important reasons" for the exercise of the Court's discretionary review. The following sections are to highlight some of the factual bases for the appellate court's resolution of the speedy trial and search and seizure issues. Brief attention will be given to some other points concerning the doctrine of *res judicata* and failure to preserve claims.

A. The Defendant's Constitutional Right To A Speedy Trial Was Not Violated

The defendant-petitioner asserts that a period of six years between initial arrest in 1973 and trial in 1979 violated the right to speedy trial guaranteed by the Federal Constitution. A review indicates that discharge on the Illinois charge, prosecution in Florida, subsequent indictment and transfer back to Illinois, appeal by the State, attempted further appeal by the defendant, and delays caused by the defendant conjoin to justify the delay of the trial. While the defendant's presentation generally spans the entire period between the initial arrest on June 9, 1973, and trial on June 7, 1979, Illinois cannot be held responsible for all the delays within that period. The majority of the delays were not caused by the State, the delays were not unreasonable, and the defendant suffered no prejudice from them.

The Illinois courts have determined that the statutory right to speedy trial was not violated in this case.[1] Generally the Illinois courts have held that compliance with the statutory right precludes a finding that the constitutional right has been violated, because the statute is seen as implementing (but not being congruent with) the provision of the Constitution. *See People* v. *Nowak* (1970), 45 Ill. 2d 158, 258 N.E.2d 313.

The criteria by which to evaluate whether the protection afforded an accused by the sixth amendment to the Constitution has been honored were set forth by this Court in its decision of *Barker* v. *Wingo* (1972), 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101. In that case a balancing test was promulgated which takes into account the conduct of the defendant as well as that of the prosecution. Four factors were set forth as important indicia of the presence or absence of protection of the right: the reason for the delay, the length of the delay, prejudice to the defendant as a result of the delay and the defendant's assertion of the right to a speedy trial. Application of these factors to the instant case demonstrates that the right to speedy trial was not violated.

Mitchell was arrested for the murder of Frances Krejci on June 9, 1973, and held on that charge until August 9, 1973, when the grand jury returned a no bill. Although the defendant was held in custody in Illinois following August 9, he was

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[1] Persons in custody (*i.e.*, being held in jail awaiting trial) must be brought to trial within 120 days, unless delay is attributable to the defendant. Those not in custody are entitled to trial within 160 days of demand, unless delay is attributable to the defendant. Interlocutory appeals toll the statutory term, as did delays attributable to defendants for crimes committed prior to March 1, 1977. Ill. Rev. Stat. 1979, ch. 38, par. 103-5. *See People* v. *Donalson* (1976), 64 Ill. 2d 536, 356 N.E.2d 776.

being so held by virtue of a Florida detainer. When bond was posted on the Florida charges on October 10, 1973, the defendant was released. From August 9, 1973, until December 20, 1974, when the grand jury returned an indictment against the defendant for the murder, there were no charges pending against the defendant in Illinois. A superceding indictment was returned on January 31, 1975, and it was upon the charges of this indictment that Florida offered to release the defendant to Illinois.[2] This offer was made March 11, 1975, and the arraignment took place on May 26, 1975, at which time the defendant agreed to a continuance.

The defendant has suggested that the inability of the State of Illinois to secure an indictment constitutes the principal reason for the initial delay in the trial. The inability to secure an indictment, however, is not a factor which should be weighed against the State. The discharge of the defendant following the initial arrest was not an exercise of prosecutorial discretion. It is significant to note that there was no immediate complaint concerning the timing of the indictment, for it was only on April 9, 1976, 11 months following the arraignment, that the first complaint was made in the initial motion for discharge. Only later, with the second motion for discharge on February 14, 1979, was complaint made concerning delay between incarceration in Florida and subsequent indictment in Illinois.

The defendant agreed to all continuances of the trial during the period between May 26, 1975, and July 13, 1976. From July 13 to October 1, 1976 (a period of 80 days) the State was responsible for continuing the matter. On October 1,

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[2] Not until legislation effective October 1, 1975, were prosecuting officials in Illinois able to bypass the grand jury in the commencement of felony cases. *See* Ill. Rev. Stat., 1979, ch. 38, par. 111-12.

1976, the defendant requested a continuance, and he first made demand for trial on October 7, 1976, from which date the 160 day term under the Illinois speedy trial statute first began to run. On the 89th day of the term the defendant filed a motion to quash a search warrant issued on June 9, 1978, and to suppress evidence seized as a result of the execution of the warrant at the defendant's home. This motion was granted by the trial court and Illinois appealed successfully the outcome of the motion. It was November 6, 1978, before the appellate processes were completed and the case returned to the docket of the Circuit Court of Cook County for trial. This period of time for the interlocutory appeal is not claimed against the State by the defendant.

From return of the case to the trial court until February 14, 1979, a period of 100 days, Illinois secured several continuances. During this time, however, the defendant had pursued a motion *in limine* directed against evidence of the criminal acts committed in Florida. On February 14, the 100th day of the 160 day term, the defendant filed a second motion for discharge raising the speedy trial issue. This motion was denied on March 1, 1979, when a new 160 day term commenced to run.[9] On June 7, 1979, the 98th day of the new term, the trial of the cause commenced.

The peculiar circumstances of this case cannot be seen as giving rise to a violation of the defendant's constitutional right to speedy trial any more than were the circumstances, including more than 5 years delay, in *Barker, supra*. The six year period included 16 months during which no Illinois charges were pending against the defendant and nearly two

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[9] Under Illinois law applicable to crimes committed before March 1, 1977, each delay attributable to the defendant causes a wholly new 160 term to commence on the date to which the case is continued. App. B, p. A-16.

years during which the appellate processes were involved with the search and seizure issue. The other periods of time, amounting to less than three years, were filled by a 16 month span between arraignment and the defendant's demand for trial on October 7, 1976, continuances caused by or agreed to by the defendant, and four disconnected periods of time during which the prosecution was responsible for seeking continuances of the trial. Given the inability of the defendant to point to any demonstrable prejudice from the delay of his trial, the reasons for the delay and the defendant's contribution to it, it is not possible to view the length as anything but justifiable. In *United States* v. *Ewell* (1966), 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627, the Court reiterated that the right to a speedy trial was relative and not simply subject to quantifiable periods of time divorced from the realities of circumstances and public justice. *See* 383 U.S. at 120.

B. The Search Warrant Issue Is *Res Judicata*, Not Properly Preserved For Review, And, In Any Event, Properly Decided By The Appellate Court Of Illinois

In its opinion of March 3, 1981, the Appellate Court of Illinois, First District, held that the issue of the validity of the search warrant and whether the evidence seized pursuant to its execution could be used during the trial of the defendant were matters already decided in the earlier interlocutory appeal of this case and could not be relitigated. The bar of the doctrine of *res judicata* was raised against the defendant. *People* v. *Mitchell* (1st Dist. 1981), 95 Ill. App. 3d 779, 420 N.E. 2d 415.

In the Petition the defendant makes reference to the decision raising the bar of *res judicata* as being curious. In point of

fact, this curious holding continues to operate as a bar to further review. The time for petitioning this Court for certiorari to review the decision reported as *In re Search Warrant (People* v. *Mitchell)* (1st Dist. 1978), 61 Ill. App. 3d, 377 N.E.2d 1073, was within 60 days following the denial of the petition for leave to appeal to the Supreme Court of Illinois which was entered sometime prior to October 31, 1978, Rule 20, Rules of the Supreme Court of the United States.

The Petition for Leave to Appeal to the Supreme Court of Illinois which was filed by the defendant subsequent to his conviction and following the appeal from that conviction to the Appellate Court of Illinois, First District, did not even raise for consideration the search and seizure issues stemming from execution of the June 9, 1973, warrant. In fact the only issues which the defendant attempted to have reviewed in the highest court of Illinois subsequent to the conviction related to the question of speedy trial. Under Illinois practice, issues not raised are deemed to have been abandoned and not properly preserved for further consideration. This practice is also carried forth in the Rules of this Court. *See* Rule 21.1 (a), Rules of the Supreme Court of the United States.

On the merits, the questions concerning the propriety of the issuance of the search warrant and the suppression of the evidence seized pursuant to the warrant's execution were rightly decided by the appellate court during the interlocutory appeal. Basic to an appreciation of the issue is a review of the affidavit of the officer who secured the warrant which is part of the complaint for the warrant and constitutes the factual record for resolution of the search and seizure issue. As reprinted in the decision of the appellate court (*See* Appendix A of the Petition for Writ of Certiorari), the complaint for the warrant contained the following recitation:

"On June 9, 1973, at approximately 11:22 A.M., the Berwyn Police Dept. was contacted by Mildred Mitchell of Bonita Springs, Florida and asked to investigate the welfare and condition of her mother, Frances Krejci, of 3622 South Cuyler, Berwyn, Illinois. Mildred Mitchell stated that her [sic] and her father had been brutally assaulted this morning by Miss Mitchell's ex-husband, Frank Anthony Mitchell. I, Officer Michael Ochsner, was assigned to investigate this call. Upon arrival at 3622 South Cuyler, Berwyn, Illinois, I was met by Lillian Beranck, a friend of Mrs. Krejci, who stated that she was expected for lunch but was unable to obtain a response from Mrs. Krejci. Two neighbors at the scene also confirmed that Mrs. Krejci had not been seen since Thursday evening, June 7, 1973, and that their attempts to arouse her were unsuccessful. At this point, I and Sgt. Ahr made a forceable [sic] entry of the premises with the assistance of the Berwyn Fire Dept. Upon entry, I discovered the victim, Frances Krejci, lying at the bottom of a staircase in the hallway. She had severe head wounds. No weapon was found at or near the scene of the crime. Frances Krejci was pronounced dead at 12:24 pm, June 9, 1973, by Dr. Santiago of the McNeal Memorial Hospital Staff. At this time, Mildred Mitchell telephoned the premises and was appraised [sic] of the condition of her mother. Miss Mitchell stated, "You gotta get my ex-husband, Frank Mitchell." Miss Mitchell further related that Frank Mitchell had attacked her and her father with a hammer in her home in Bonita Springs, Florida at apprx. 4:15 am on this date (June 9, 1973). She further stated that she telephoned Frank Mitchell at his home in Bartlett, Illinois at 11:30 am this date (June 9, 1973) and found him to be home. She then provided us with the address of Frank Mitchell (465 South Oak Glenn Drive, Bartlett, Illinois). Based upon the facts as set out in this complaint and the strong similarity of this crime and the crimes in Florida, I believe a search of these premises will reveal evidence of this crime."

In reversing the order of the trial court which granted the defendant's motion, the appellate court reasonably and correctly held that a warrant issued upon the foregoing permises was issued upon probable cause and that it sufficiently described the items subject to seizure by directing the seizure of "any clothing, weapons, instruments, articles or contraband which have been used in the commission of or which constitute evidence of the offense of murder."

The appellate court's opinion gives ample justification for the conclusions it reaches upon examination of both the probable cause and particularity of description requirements of the fourth amendment. The opinion is consistent with the policies enunciated by this Court in *Jones* v. *United States* (1960), 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed 2d 697 (preference for warrants), and *Spinelli* v. *United States* (1969), 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (sufficiency of complaints for search warrants should be examined in a realistic and common sense fashion). *See also United States* v. *Scharfman* (2d Cir. 1971), 448 F.2d 1352, *cert. den.*, 405 U.S. 919 (specificity); *James* v. *United States* (5th Cir. 1969), 416 F.2d 467 (specificity enhanced by executing officer's awareness of the crime scene).

C. The Question Of The "Other Crimes" Evidence Is Within The Domain Of State Law And Not A Matter Reviewable By Writ Of Certiorari To A State Appellate Court

As mentioned above under section B of this Brief, the only issues which the defendant preserved for further review following the decision of the appellate court affirming his conviction, concerned the matter of speedy trial. The "other crimes" evidence issue was not presented to the Supreme

Court of Illinois for its consideration in the petition for leave to appeal, and it should not be presented to this Court.

In the Petition for Writ of Certiorari the defendant recognizes that the "other crimes" issue is not one of constitutional magnitude and seeks review of the issue by this court in order that such magnitude might be conferred. (Pet. at 24-25.) However, the entire reason for review by certiorari of the decisions of state courts is to correct errors in the decision of federal questions. The defendant presents the question of the "other crimes" evidence in the context of a federal question for the first time only before this Court. No state court was asked to consider the constitutional dimensions of this issue, and this Court should not establish itself as a court of first instance in order to entertain the matter. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

Simply, the history of the presentation of the "federal question" encompassed by the "other crimes" evidence issue is one which manifests the fact that this matter is one within the domain of State law. The decision of the appellate court recognizes the general applicability of the rule of evidence which excludes testimony concerning other crimes, but allowed the evidence in this case due to the relationship of the attacks in Florida to the attack and murder in Illinois. The basis for this ruling and the facts involved are well set forth in the opinion. (*See* Appendix B of the Petition for Writ of Certiorari.) Not only does the issue not arise to the proportions of federal law sought by the defendant, it was properly decided within the applicable domain of State law.

D. The Evidence Established The Defendant's Guilt Beyond Reasonable Doubt And Should Not Be Reviewed Again By This Court By Way of Certiorari

As with the issues raised in the preceeding two sections, this matter of whether the defendant was convicted on the basis of evidence establishing guilt beyond reasonable doubt was not addressed in the petition for leave to appeal filed with the Supreme Court of Illinois. Furthermore, nowhere in the Illinois courts was this matter addressed as an issue involving federal constitutional law. As a consequence, there is no decision from a state court deciding the reasonable doubt issue as a federal question, no basis for certiorari.

The opinion of the appellate court (Appendix B to the Petition for Writ of Certiorari) has summarized the evidence admitted at the trial of this case in the circuit court of Cook County. Admittedly the evidence is entirely circumstantial; nevertheless, the evidence is clear in establishing that the defendant did murder his former mother-in-law, Frances Krejci. Illinois does not believe this Court ought to sit in review of State criminal convictions in order to decide if a trial judge was convinced beyond a reasonable doubt of the guilt of a defendant. To accept such a role in an effort to give further strength to the decision in *Jackson* v. *Virginia* (1979), 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560, would be an invitation to countless petitions and an indication that the Court places little confidence in the abilities of state trial and appellate tribunals to measure the guilt of a criminal defendant in reference to the evidence.

CONCLUSION

For the foregoing reasons, and for the reasons addressed in the decisions of the Appellate Court of Illinois (Appendices A and B of the Petition for Writ of Certiorari), the People of the State of Illinois respectfully urge the Court to deny the Petition.

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